Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Petitioners,

v.

DETREX CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the mandate of 42 U.S.C. § 9613(g)(2)—that a declaratory judgment on liability for environmental response costs is binding in all subsequent actions to recover further response costs—should be applied to an order quantifying attorneys' fees and costs that were awarded, consistent with the law at the time, as response costs under CERCLA in a declaratory judgment affirmed on appeal and from which certiorari was denied prior to this Court's decision in *Key Tronic Corp. v. United States,* —— U.S. ——, 114 S. Ct. 1960 (1994).

2. Whether a declaratory judgment deciding Petitioners' entitlement to recover attorneys' fees and litigation expenses as response costs, pursuant to § 42 U.S.C. § 9613(g)(2), is binding under *res judicata* or collateral estoppel principles regardless of a subsequent change in the law by *Key Tronic v. United States,* —— U.S. ——, 114 S. Ct. 1960 (1994), which determined that response costs under CERCLA do not include attorneys' fees and expenses incurred in litigation.

THE PARTIES

Petitioners are Amcast Industrial Corporation ("Amcast") and Elkhart Products Corporation ("EPC"), a wholly-owned subsidiary of Amcast. Respondent is Detrex Corporation ("Detrex").

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
THE PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Introduction	3
B. Procedural History of the Case and Jurisdictional Statement	5
REASONS FOR GRANTING THE PETITION	7
I. CERCLA, 42 U.S.C. § 9613(g)(2), MANDATES THAT THE DECLARATORY JUDGMENT AWARDING AMCAST AND EPC RESPONSE COSTS THAT INCLUDE ATTORNEYS' FEES AND LITIGATION EXPENSES, WHICH WAS AFFIRMED IN AN EARLIER APPEAL, IS BINDING IN A SUBSEQUENT PROCEEDING AND APPEAL REGARDLESS OF A CHANGE IN LAW ANNOUNCED AFTER THE CONCLUSION OF THE FIRST APPEAL	10
A. Statutory Language and Legislative History	10
B. Detrex Fully and Completely Litigated the Recoverability of Attorneys' Fees as Response Costs in the First Detrex Appeal; the Seventh Circuit Erred in Not Giving the Declaratory Judgment Binding Effect as to Amcast's and EPC's Entitlement to Attorneys' Fees	14

TABLE OF CONTENTS—Continued

Page

II. THE SEVENTH CIRCUIT'S FAILURE TO GIVE BINDING EFFECT TO THE DECLARATORY JUDGMENT ON PETITIONERS' ENTITLEMENT TO RECOVER ATTORNEYS' FEES VIOLATES THE PRINCIPLES ESTABLISHED BY THIS COURT GOVERNING THE EFFECT OF A CHANGE IN LAW ON FINAL JUDGMENTS 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

	Page
Amcast Indus. Corp. v. Detrex Corp., 45 F.3d 155 (7th Cir. 1995)	*passim*
Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746 (7th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 691 (1994)	2, 3
Detrex Corp. v. Amcast Indus. Corp., —— U.S. ——, 114 S. Ct. 691 (1994)	5
Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 101 S. Ct. 2424	16, 17
Gilldorn Savings Ass'n v. Commerce Savings Ass'n, 804 F.2d 390 (7th Cir. 1986)	14
Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 98 S. Ct. 2370 (1978)	10
Harper v. Virginia Dep't of Taxation, —— U.S. ——, 113 S. Ct. 2510 (1993)	10, 17
In re Dant & Russell, Inc., 951 F.2d 246 (9th Cir. 1991)	12
James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439 (1991)	10, 17
Key Tronic Corp. v. United States, —— U.S. ——, 114 S. Ct. 1960 (1994)	3, 5
Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80 (2d Cir. 1961)	14-15
Miller Brewing Co. v. Joseph Schlitz Brewing Co., 605 F.2d 990 (7th Cir. 1979)	14
Packard Motor Car Co. v. NLRB, 330 U.S. 485, 67 S. Ct. 789 (1947)	11
United States v. American Trucking Ass'n, 310 U.S. 534, 60 S. Ct. 1059 (1940)	11
United States v. Missouri Pacific R.R. Co., 278 U.S. 269, 49 S. Ct. 133 (1929)	11

STATUTES

28 U.S.C. § 1254(1)	3
28 U.S.C. § 1291	14
42 U.S.C. §§ 9601-9675	1
42 U.S.C. § 9607(a)	4
42 U.S.C. § 9613(b)	3
42 U.S.C. § 9613(g)(2)	*passim*

TABLE OF AUTHORITIES—Continued

RULES

Page

Fed. R. App. P. 40 4

MISCELLANEOUS

62 U.S.L.W. 3279 (U.S. Oct. 12, 1993) (No. 93-376) 4

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The district court granted Petitioners Amcast and EPC summary judgment on their CERCLA [1] claims against Respondent Detrex for environmental response costs as reported at 779 F. Supp. 1519 (N.D. Ind. 1991) and 822 F. Supp. 545 (N.D. Ind. 1992). Pursuant to 42 U.S.C. § 9613(g)(2), the district court, among other things, entered a final declaratory judgment, corrected by an order issued December 8, 1992 ("Corrected Judgment"), Record Vol. 16, No. 376, adjudicating that:

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[1] Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675.

> "Declaratory judgment is entered for the plaintiffs as to defendant Detrex's liability for all future response costs incurred by plaintiffs in responding to the TCE contamination at plaintiff Elkhart Products' Plant in Elkhart, Indiana. *The future response costs for which defendant Detrex* and its successors or assigns *are liable include attorney fees, litigation, and [sic] expenses and prejudgment interest.*" (Emphasis added).

On appeal, the Seventh Circuit Court of Appeals affirmed the declaratory judgment in all but one respect unrelated to the amount or nature of the response costs awarded. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 691 (1994). After this Court denied Detrex's petition for a writ of *certiorari* and the case returned to the district court, the district court further quantified the response costs for which Detrex was liable as $554,494.71 for attorneys' fees and litigation expenses, $30,636.76 in additional response costs, and $315,359.47 in prejudgment interest. Judgment in Civil Case and Memorandum and Order, March 31, 1994, Appendix, pp. 10a-36a. Detrex timely appealed that judgment which further quantified the response costs awarded, including attorneys' fees and other litigation costs, to the Seventh Circuit Court of Appeals.

Petitioners moved to dismiss that portion of Detrex's second appeal that sought to (1) reargue, based on the National Contingency Plan ("NCP"), whether Detrex was liable under CERCLA for any response costs and (2) excise from the response costs awarded any sums relating to attorneys' fees or litigation expenses. The Seventh Circuit dismissed the second appeal to the extent that Detrex sought to relitigate whether it was liable under CERCLA. App., p. 37a. The Seventh Circuit allowed the second appeal to proceed, insofar as it challenged whether attorneys' fees and expenses were compensable response costs under CERCLA. Although petitioners had been awarded attorneys' fees and expenses

as response costs under the first full appeal, the Seventh Circuit reversed the award of attorneys' fees and costs based on the application of *Key Tronic Corp. v. United States*, —— U.S. ——, 114 S. Ct. 1960 (1994), which was decided while the second appeal was pending. 45 F.3d 155 (1995) (App., p. 1a). The Seventh Circuit's decision, nullifying an award of attorneys' fees and litigation expenses as response costs that had been affirmed in a prior appeal, conflicts with the express language of 42 U.S.C. § 9613(g)(2).

JURISDICTIONAL STATEMENT

The Seventh Circuit Court of Appeals entered judgment on January 10, 1995. This Court has jurisdiction to review the Seventh Circuit's judgment by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1). The district court possessed jurisdiction pursuant to 42 U.S.C. § 9613(b).

STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation and application of 42 U.S.C. § 9613(g)(2), which is set forth at App., p. 123a.

STATEMENT OF THE CASE

A. Introduction

Pursuant to 42 U.S.C. § 9613(g)(2), the district court, among other things, entered a final declaratory judgment holding Detrex liable for all future response costs incurred by Amcast and EPC to clean up environmental contamination from spilled trichloroethylene ("TCE") at EPC's plant in Elkhart, Indiana, including attorneys' fees, litigation expenses and prejudgment interest. In the first appeal, *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 691 (1994), the Seventh Circuit affirmed the declaratory judgment in all but one respect

that did not affect, at all, the entitlement of Amcast and EPC to recover all of their response costs, including attorneys' fees and litigation expenses.

Although the Seventh Circuit's opinion in the first appeal did not expressly discuss the inclusion of attorneys' fees and litigation expenses as compensable response costs (even though Detrex raised that issue, *Amcast Indus. Corp. v. Detrex Corp.*, 45 F.3d 155 (7th Cir. 1995)), App., p. 7a. Detrex did not seek a rehearing on that (or any other issue pursuant to Fed. R. App. P. 40. Rather than seek a rehearing before the Seventh Circuit, Detrex petitioned for a writ of *certiorari* from this Court. Remarkably, Detrex did not raise the recoverability of attorneys' fees and litigation expenses as CERCLA response costs as an issue for review by this Court.[2]

On September 7, 1993, Key Tronic petitioned for a writ of *certiorari* to address the inclusion of attorneys' fees and litigation expenses as CERCLA response costs. 62 U.S.L.W. 3279 (U.S. Oct. 12, 1993) (No. 93-376). Thereafter, on November 5, 1993 (almost two months after the *Key Tronic* petition for *certiorari* was filed),

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[2] Questions presented for review from Detrex Petition for Writ of Certiorari, App., pp. 120a-122a. In the Petition for Writ of *Certiorari*, Detrex presented these questions for review:

> "(1) Whether the bulk delivery of useful hazardous substances by Petitioner in tanker trucks to Respondents' manufacturing plant falls within the scope of the exception to the definition of 'facility' which excludes consumer products in consumer use or in vessels found in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601 through 9675?
>
> (2) Is a cost recovery lawsuit by a potentially responsible party against other liable parties under 42 U.S.C. § 9607(a) of the Comprehensive Environmental Response, Compensation and Liability Act an action for contribution requiring district courts to equitably apportion responsibility among the litigants after strict and joint and several liability is imposed?"

Detrex filed its petition for a writ of *certiorari*. Inexplicably, Detrex's petition for a writ of *certiorari*, filed while the *Key Tronic* petition was pending, did not raise the issue of whether CERCLA response costs include litigation costs.[3] Appellate review of the declaratory judgment against Detrex for response costs, including attorneys' fees and litigation costs, ended with Detrex's failure to raise that issue in its petition for a writ of *certiorari*.[4]

B. Procedural History of the Case and Jurisdictional Statement

After the Seventh Circuit's mandate was issued to the district court upon completion of the first appeal, the district court quantified additional response costs awarded to Amcast and EPC pursuant to the final declaratory judgment. In accordance with the final declaratory judgment that had been fully appealed, the district court, among other things, awarded Amcast and EPC $554,494.71 for attorneys' fees and litigation expenses. App., p. 34a. Detrex appealed that judgment to the Seventh Circuit.

Detrex's second appeal did not contest the amount of the attorneys' fees and litigation expenses awarded by the district court. Instead, Detrex's second appeal asserted that *Key Tronic* required reversal of the entire attorneys' fee and litigation expense award.[5] Amcast and

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[3] On December 13, 1993, this Court granted the petition for a writ of *certiorari* in *Key Tronic*.

[4] Detrex's petition for writ of *certiorari* in the first Detrex appeal was denied by this Court. *Detrex Corp. v. Amcast Indus. Corp.*, —— U.S. ——, 114 S. Ct. 691 (1994).

[5] *Key Tronic Corp. v. United States*, —— U.S. ——, 114 S. Ct. 1960 (1994). *Key Tronic* was decided by this Court after Detrex's first appeal was final and the district court had quantified the fees and costs to which Amcast and EPC were entitled.

EPC contended that the final declaratory judgment holding Detrex liable for attorneys' fees and costs was binding under 42 U.S.C. § 9613(g)(2) (and under principles of *res judicata*) in any subsequent proceeding, including Detrex's second appeal. As a result of Detrex's first appeal, which included this Court's denial of *certiorari*, *Key Tronic* could not be applied retroactively to vacate the declaratory judgment awarding Amcast and EPC attorneys' fees and costs.

Without discussing or considering the provisions of 42 U.S.C. § 9612(g)(2), which mandates that a declaratory judgment on liability or entitlement to response costs be given binding effect on subsequent proceedings, the Seventh Circuit decided erroneously that the declaratory judgment was not to be given *res judicata* effect and was subject to *Key Tronic*'s subsequent change in the law. Thus, the Seventh Circuit reversed entirely the award to Amcast and EPC of attorneys' fees and litigation expenses as response costs.

In reversing the award of attorneys' fees and litigation costs, the Seventh Circuit recognized that, in the first appeal, it had affirmed, with an immaterial exception, the declaratory judgment that awarded Amcast and EPC attorneys' fees and expenses in an undetermined amount. *Amcast Indus. Corp. v. Detrex*, 45 F.3d 155, App., p. 3a. The Seventh Circuit correctly recognized that a final judgment is not an absolute requirement of *res judicata* or collateral estoppel. *Id.*, App., p. 5a. The Court of Appeals also correctly recognized that, in the first appeal, it decided upon full hearing and with finality that response costs include attorneys' fees. *Id.*, App., p. 7a. As the Seventh Circuit stated, "[we] had decided the issue of entitlement 'finality'." *Id.*

The Seventh Circuit, however, erroneously decided that the declaratory judgment establishing Detrex's liability and Amcast's and EPC's entitlement to recover attorneys' fees—although decided finally—was not binding,

because Detrex had not exhausted its appellate remedies from the order quantifying attorneys' fees. *Id.* In so doing, the Seventh Circuit erred by ignoring the mandate of 42 U.S.C. § 9613(g)(2) that a declaratory judgment establishing an entitlement to recover response costs under CERCLA is binding in all subsequent actions or proceedings to recover further response costs. In short, the Seventh Circuit erred by throwing out the entitlement of Amcast and EPC to attorneys' fees and litigation expenses as response costs, contrary to 42 U.S.C. § 9613 (g)(2), when the only issue properly before the Court of Appeals (but not raised by Detrex) was whether the district court had properly quantitfied the attorneys' fees and costs.

REASONS FOR GRANTING THE PETITION

CERCLA requires that a declaratory judgment establishing liability for response costs or damages is binding in all subsequent actions for further reponse costs or damages: "In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613 (g)(2). Hence, CERCLA's plain language, which was erroneously ignored by the Seventh Circuit, requires that the declaratory judgment awarding Amcast and EPC response costs, including attorneys' fees and expenses, which was affirmed by the Seventh Circuit, is binding regardless of *Key Tronic*'s subsequent change in the law that removed litigation costs from compensable response costs under CERCLA.

Detrex's first appeal challenged the district court's declaratory judgment awarding Amcast and EPC current and future response costs that included attorneys' fees and costs. The Seventh Circuit affirmed the declaratory judgment awarding attorneys' fees and expenses as response costs and Detrex failed to file a petition for re-

hearing on this issue. Moreover, despite the pendency of *Key Tronic* before this Court, Detrex's petition for a writ of *certiorari,* which this Court denied, failed to challenge the propriety of awarding attorneys' fees as response costs. Although, as the Seventh Circuit acknowledged in the second appeal, 42 F.3d 155, App., pp. 7a-8a,

> (a) the first appeal decided "finally" that Amcast and EPC were entitled to attorneys' fees and litigation expenses as part of their recoverable response costs,
>
> (b) the district court and the Seventh Circuit fully heard Detrex's arguments on this issue, and
>
> (c) Detrex's petition for *certiorari* could have sought (but did not seek) review of this issue by this Court,

the Seventh Circuit, in the second appeal, did not give the declaratory judgment binding effect. Thus, the Seventh Circuit erroneously, and contrary to the express language of 42 U.S.C. § 9613(g)(2), reversed the award of attorneys' fees.

It is fundamentally unfair to deny Amcast and EPC the benefits of the declaratory judgment awarding them attorneys' fees and litigation expenses as response costs (a) when that judgment, on that precise issue, was appealed to and affirmed by the Seventh Circuit, and (b) Detrex, in its first appeal, petitioned unsuccessfullly for a writ of *certiorari* from this Court while failing to raise the issue of whether response costs include attorneys' fees. This harsh result, which rides roughshod over the express language of 42 U.S.C. § 9613(g)(2), should not be tolerated by this Court, because Detrex, through its first appeal to the Seventh Circuit and its petition for a writ of *certiorari,* had a full, fair and adequate opportunity to litigate whether recoverable response costs include litigation expenses. Yet, after that issue was decided finally in favor of Amcast and EPC and the

awarded attorneys' fees were quantified, the benefit of the declaratory judgment is denied Amcast and EPC because of a change in law occurring *after* the final adjudication of Amcast's and EPC's entitlement to these sums.

In addition to the fundamental unfairness resulting from the Seventh Circuit's decision, the Seventh Circuit's decision, if upheld, defeats CERCLA's plain language and Congress's manifest intent by ignoring the requirements of 42 U.S.C. § 9613(g)(2). *Certiorari* should be granted because the Seventh Circuit's opinion, if upheld, treats 42 U.S.C. § 9613(g)(2) as meaningless surplusage to the complete frustration of the Congressional intent underlying CERCLA's statutory framework. Congress has determined that a party found to be entitled to recover response costs in an initial cost recovery action should not be subject to the burden and expense of relitigating the entitlement issue in subsequent proceedings to recover further response costs. This clear Congressional intent, manifested unambiguously in the statutory language, is particularly undermined by the Seventh Circuit's decision in this case, because Detrex fully litigated this issue in the first appeal and lost, and this Court denied Detrex's petition for a writ of *certiorari*.

Moreover, the policy interest underlying 42 U.S.C. § 9613(g)(2), which is consistent with *res judicata* principles that maintain the predictability, reliablity and finality of judgments entered by the federal courts, is completely destroyed by the Seventh Circuit's decision. The Seventh Circuit's decision at issue reversed a declaratory judgment, final after review by the Seventh Circuit and this Court's denial of a writ of *certiorari*, on the basis of a retroactive application of a change in law.

A writ of *certiorari* should be granted in this case because the Seventh Circuit has decided an important question of federal statutory law in a way that treats a key provision of CERCLA as meaningless surplusage to the

frustration of both (a) unambiguously expressed Congressional intent and policy of finality underlying 42 U.S.C. § 9613(g)(2), and (b) *res judicata* principles for preserving the predictability, reliability and finality of judgments, particularly declaratory judgments under CERCLA. CERCLA, 42 U.S.C. § 9613(g)(2), mandates that the declaratory judgment awarding Amcast and EPC attorneys' fees and litigation costs as part of their recoverable response costs, which has been fully appealed once before, should not be reversed by a change in law that occurred after the conclusion of the first appeal.

The second issue raised by this petition for writ of *certiorari* is whether *res judicata* or collateral estoppel principles bar the application of a subsequent change in law to this case. *Certiorari* should be granted on this second issue because the Seventh Circuit misapplied this Court's recent precedents in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 111 S. Ct. 2439 (1991) and *Harper v. Virginia Dep't of Taxation,* —— U.S. ——, 113 S. Ct. 2510 (1993), which establish that a change of law is not applied to other cases where barred by procedural requirements or *res judicata. James B. Beam Distilling Co.,* 501 U.S. at 544, 113 S. Ct. at 2445.

I. CERCLA, 42 U.S.C. § 9613(g)(2), MANDATES THAT THE DECLARATORY JUDGMENT AWARDING AMCAST AND EPC RESPONSE COSTS THAT INCLUDE ATTORNEYS' FEES AND LITIGATION EXPENSES, WHICH WAS AFFIRMED IN AN EARLIER APPEAL, IS BINDING IN A SUBSEQUENT PROCEEDING AND APPEAL REGARDLESS OF A CHANGE IN LAW ANNOUNCED AFTER THE CONCLUSION OF THE FIRST APPEAL

A. Statutory Language and Legislative History

In every case involving statutory construction, the starting point is the language of the statute itself. *Greyhound Corp. v. Mt. Hood Stages, Inc.,* 437 U.S. 322,

330, 98 S. Ct. 2370, 2375 (1978). If the statutory words are clear, then there is neither need nor warrant to look elsewhere. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492, 67 S. Ct. 789, 793 (1947). A court should depart from the official text of the statute and seek extrinsic aids to its meaning only if the language is not clear, *United States v. Missouri Pacific R.R. Co.*, 278 U.S. 269, 278, 49 S. Ct. 133, 136 (1929), or if the apparent clarity of language leads to an absurd result when applied. *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543-44, 60 S. Ct. 1059, 1063-64 (1940).

CERCLA, 42 U.S.C. § 9613(g)(2), provides that once an entitlement to response costs or damages is established, that determination becomes binding in all future actions to recover further response costs or damages: "In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages."

Section 9613(g)(2) is an integral component of CERCLA's intended goal of promoting private party cleanups of pollution:

> "These sections envision that, before suing, CERCLA plaintiffs will spend some money responding to an environmental hazard. They can then go to court and obtain reimbursement for their initial outlays, as well as a declaration that the responsible party will have continuing liability for the costs of finishing the job.
>
> This system strikes a balance between a number of considerations. By requiring a plaintiff to take some positive action before coming to court, CERCLA ensures that the dispute will be ripe for judicial review. [Citation omitted.] On the other hand, by not requiring plaintiffs to perform full cleanup before

> coming to court, and by expressly providing for declaratory judgments, CERCLA substantially reduces the risk involved in performing the cleanup. This encourages private response. [Citation omitted.] Similarly, actual cleanup is encouraged by requiring plaintiffs to incur response costs before they can recover them. Since CERCLA places no strings on the award of response costs, allowing recovery for future costs absent any binding commitment to incur these costs would leave no incentive to complete the cleanup."

In re Dant & Russell, Inc. v. Burlington N. R.R. Co., 951 F.2d 246, 249-50 (9th Cir. 1991).

The statute's clear language permits cost-recovery plaintiffs such as Amcast and EPC, after they have incurred some (but not all) response costs, to bring an initial cost recovery action in which the court will determine the defendant's liability for further response costs. CERCLA's statutory scheme precludes a defendant found liable for response costs from relitigating the plaintiff's entitlement to recover response costs in subsequent proceedings brought to recover further response costs.

Since the statutory language is clear and unambiguous, the legislative history of § 9613(g)(2) need not be considered. If the legislative history of § 9613(g)(2) were considered, however, its provenance firmly supports the preservation of Amcast's and EPC's declaratory judgment:

> "The conference substitute also provides, as did the House amendment, for the entry of a declaratory judgment, *which is to have a binding effect in future claims for future response costs as to the vessel or facility in question.* This is consistent with the overall structure of CERCLA, which contemplates that the President may bring a series of claims for response costs under section 107, injunctive relief under section 106, or actions for access under section

> 104 without regard to a particular site or facility. If the President brings an earlier action for such claims, he is not barred in a subsequent action from bringing other claims. The doctrine of collateral estoppel remains applicable in these actions." Superfund Amendments of 1986, Legislative History, P.L., 99-499, p. 223. (Emphasis added.)

The House Committee amendment to CERCLA contemplated that there would be successive cost-recovery actions brought at various points during implementation of a remedial action, but that liability would be determined once in the initial cost recovery action: "In the initial cost recovery action, in order to conserve judicial time and resources, the court is to enter a declaratory judgment on liability for response costs; this judgment will be binding in future cost recovery actions to obtain additional costs." Legislative History, P.L. 94-499, p. 21. CERCLA's legislative history confirms the intent of Congress that, once liability for response costs was determined in the initial cost-recovery action, that declaratory judgment establishing an entitlement to recover response costs would not be subject to relitigation in a subsequent proceeding to recover or quantify additional response costs, but instead would be binding on the responsible party defendant.

Here, the language of 42 U.S.C. § 9613(g)(2) is clear. Once liability has been determined in an initial cost-recovery action, the court's declaratory judgment on liability and damages is binding in any subsequent proceeding to recover further costs. In this case, the initial cost-recovery action resulted in a declaratory judgment holding Detrex liable and awarding Amcast and EPC incurred and future response costs that included attorneys' fees and litigation expenses. That declaratory judgment became final as a result of Detrex's first appeal. The decision of the Seventh Circuit in this second appeal to vacate the final declaratory judgment on the basis of a change in law that occurred *after* Petitioners' right to

recover attorneys' fees as response costs and expenses was finally established contravenes the clear and unambiguous statutory language of 42 U.S.C. § 9613(g)(2).

Moreover, if the legislative history of § 9613(g)(2) of CERCLA is considered (and it need not be), then that history shows a clear Congressional intent to disallow relitigation in a subsequent proceeding of a declaratory judgment on liability for response costs established in the initial cost-recovery proceeding. Thus, the decision of the Seventh Circuit contravenes the intent of Congress as shown by the legislative history of § 9613 of CERCLA and for this reason must be reversed. By ignoring the plain language and intent of § 9613, the Seventh Circuit has done excessive violence to CERCLA's statutory scheme, to the detriment of Amcast, EPC and future litigants.

B. Detrex Fully and Completely Litigated the Recoverability of Attorneys' Fees as Response Costs in the First Detrex Appeal; the Seventh Circuit Erred in Not Giving the Declaratory Judgment Binding Effect as to Amcast's and EPC's Entitlement to Attorneys' Fees

The Seventh Circuit's opinion correctly recognized that in *Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979) and *Gilldorn Savings Ass'n v. Commerce Savings Ass'n*, 804 F.2d 390, 393 (7th Cir. 1986), it had adopted Judge Friendly's holding in *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961) that a final judgment in the sense of 28 U.S.C. § 1291 is not required for the application of the doctrines of *res judicata* or collateral estoppel. *Amcast Indus. Corp. v. Detrex*, 45 F.3d 155, App., p. 3a-4a. The *Lummus* rule is

> "Whether a judgment, not 'final' in the sense of 28 U.S.C. § 1291, ought nevertheless be considered 'final' in the sense of precluding further litigation of the same issue, turns upon such factors as the nature

> of the decision (*i.e.*, that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. 'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again."

297 F.2d at 89.

The Seventh Circuit erred by misapplying the *Lummus* rule in this case when it declined to give the declaratory judgment on entitlement to attorneys' fees binding effect. Significantly, the Seventh Circuit recognized, 45 F.3d 155, App., p. 7a:

> ". . . superficially at least, the *Lummus criteria seem fulfilled in this case.* We had decide, upon full hearing and, we thought, with finality, that response costs do include attorneys' fees. *Certiorari* had been sought and denied. The issue was concluded, and could not have been reexamined by the district court; only the amount of attorneys' fees, not the plaintiff's entitlement to them, remain for further consideration. *We decided the issue of entitlement 'finally.'* " (Emphasis added.)

Nonetheless, the Seventh Circuit erroneously reasoned that the *Lummus* rule did not apply to bar relitigation of Amcast's and EPC's entitlement to recover attoreys' fees, because Detrex had not exhausted its appellate remedies. *Id.* App., p. 7a. The Seventh Circuit reached its conclusion despite the facts that the declaratory judgment on entitlement to response costs that included attorneys' fees and litigation expenses (a) was not tentative, (b) resulted from a full hearing in the district and appellate courts, and (c) Detrex had a full opportunity to be heard on the issue in the first Detrex appeal.

The Seventh Circuit's decision is wrong because it ignored the results of the first Detrex appeal, and, more importantly, ignored the requirements of 42 U.S.C. § 9613(g)(2) that the declaratory judgment establishing

an entitlement to recover attorneys' fees as damages was binding in the district court proceeding which quantified attorneys' fees and in this second appeal taken from that quantification order. Since § 9613(g)(2) mandates that the declaratory judgment has an ongoing binding effect, the Court of Appeals erred in failing to give the declaratory judgment binding effect. The Seventh Circuit should have concluded that the resolved issue of Amcast's and EPC's entitlement to recover attorneys' fees as response costs was binding upon Detrex and that the only issue left open for appeal related to the reasonableness of the quantification, an issue that Detrex did not raise on appeal.

In addition. the Seventh Circuit erred in concluding that the *Lummus* factors were not met. The *Lummus* factors, including adequacy of the hearing and opportunity to be heard, were met in this case. Detrex had a full and complete opportunity throughout the district court and first appeal proceedings to litigate the issue of whether recoverable response costs include attorneys' fees. Thus, in applying the *Lummus* rule, the Seventh Circuit erred in failing to find that the declaratory judgment establishing an entitlement to recover attorneys' fees was binding.

II. THE SEVENTH CIRCUIT'S FAILURE TO GIVE BINDING EFFECT TO THE DECLARATORY JUDGMENT ON PETITIONERS' ENTITLEMENT TO RECOVER ATTORNEYS' FEES VIOLATES THE PRINCIPLES ESTABLISHED BY THIS COURT GOVERNING THE EFFECT OF A CHANGE IN LAW ON FINAL JUDGMENTS

As previously shown under the *Lummus* factors, the declaratory judgment on Petitioners' entitlement to recover attorneys' fees was final for the purposes of *res judicata* or collateral estoppel. This Court's decision in *Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428 (1981) established the prin-

ciple that the *res judicata* consequences of a final judgment on the merits are not "altered by the fact that the judgment may have . . . rested on a legal principle subsequently overruled in another case." More recently this Court has established the rule that a change in law will be given retroactive effect to all other pending cases *only if* its application is not barred by procedural requirements or *res judicata*. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S. Ct. 2439, 2445 (1991); *Harper v. Virginia Dept. of Taxation*, —— U.S. ——, 113 S. Ct. 2510, 2517 (1993). In *James B. Beam Distilling Co.*, 501 U.S. at 543, 111 S. Ct. at 2444, this Court held: "[W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*."

Thus, the Seventh Circuit also erred in failing to determine that the application of a change in law that occurred after Petitioners' entitlement to recover attorneys' fees was established by a final declaratory judgment is barred by *res judicata* or collateral estoppel. Even if the final declaratory judgment that recoverable response costs include attorneys' fees is "wrong" under the subsequent rule of law established in *Key Tronic*, the *res judicata* or collateral estoppel effect of the final declaratory judgment holding Detrex liable for the costs prevails and is not affected by the change in law announced in *Key Tronic*. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. at 399, 101 S. Ct. at 2428; *James B. Beam Distilling Co. v. Georgia*, 501 U.S. at 544, 111 S. Ct. at 2445. This result is completely consistent with 42 U.S.C. § 9613 (g)(2) and amplifies the propriety of accepting review of the Seventh Circuit's decision.

CONCLUSION

Accordingly, the petition for writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-2026

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Plaintiffs-Appellees,

v.

DETREX CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division

No. 88 C 620. Robert L. Miller, Jr., Judge

November 29, 1994, Submitted

January 10, 1995, Decided

Before POSNER, Chief Judge, and FLAUM and KANNE, Circuit Judges.

POSNER, Chief Judge: This is a sequel to the decision of the same panel reported at 2 F.3d 746 (7th Cir. 1993), in which we largely affirmed a judgment that the district court had entered in December of 1992 declaring that Detrex Corporation was liable to the plaintiffs for

"response costs" under the Superfund statute, 42 U.S.C. § 9613(g)(2), and that these response costs included the attorneys' fees that the plaintiffs had incurred to establish Detrex's liability. No assessment of attorneys' fees had yet been made, however. More than a year later—March 1994—the district court entered an order directing Detrex to pay more than $500,000 in attorneys' fees, from which Detrex appeals. In June, while this appeal was pending, the Supreme Court decided *Key Tronic Corp. v. United States,* 128 L. Ed. 2d 797, 114 S. Ct. 1960 (1994), holding that response costs do not include attorneys' fees. Detrex argues that the doctrine of law of the case permits us to reconsider, in light of Key Tronic, our earlier ruling that response costs include attorneys' fees. The plaintiffs call the ruling res judicata, precluding reconsideration. We affirmed the district court's declaratory judgment in all but one respect, and this unrelated to the amount of response costs for which Detrex was liable or to the issue whether those costs include attorneys' fees. (The district judge had based liability on Detrex's status not only as an owner and operator of tanker trucks but also as an arranger of transportation by a common carrier, and we held that it was liable only as an owner and operator.) The plaintiffs ask us to hold that when we affirmed the relevant portions of the declaratory judgment, and the Supreme Court denied certiorari, the judgment became "final" for purposes of res judicata.

If in our first decision we had merely ruled that response costs include attorneys' fees, and had remanded for the entry of an appropriate judgment, it would be reasonably clear that the ruling was merely an interim ruling in an ongoing case. The doctrine of law of the case, which governs the weight that interim rulings in a litigation are given in the subsequent stages of that litigation, *Williams v. Commissioner,* 1 F.3d 502, 503-04 (7th Cir. 1993); *Devines v. Maier,* 728 F.2d 876, 880 (7th Cir. 1984), would apply—not res judicata—and

would permit reconsideration on the basis of an intervening decision by the Supreme Court. *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991); *Young v. Herring*, 938 F.2d 543, 547-48 (5th Cir. 1991) (en banc). We did more. We affirmed, with an immaterial exception, a declaratory judgment one element of which was a declaration that the plaintiffs were entitled to an award of attorneys' fees in an amount not yet determined. The Supreme Court denied certiorari. All this happened before the Key Tronic decision.

The denial of certiorari is a red herring. It marks the end of the appellate process and so, if the judgment from which certiorari was sought were itself a final judgment (the significance of this qualification will become clear in due course), it establishes finality in a strong sense. But we shall see that a final judgment is res judicata even if it is still appealable. A more important though not necessarily decisive point is that our ruling when last this case was before this panel was not a final judgment in the sense in which 28 U.S.C. § 1291 (the "final judgment" rule of federal appealability) makes certain decisions by district courts final and appealable; and the black-letter rule is that the doctrine of res judicata requires a final judgment. *Federated Department Stores v. Moitie*, 452 U.S. 394, 398-99, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981); *Hermann v. Cencom Cable Associates, Inc.*, 999 F.2d 223, 224 (7th Cir. 1993). This is true whether one is speaking of res judicata in its narrow sense ("claim preclusion") as a bar against relitigating or splitting claims, or of collateral estoppel ("issue preclusion"), which bars the relitigation, in subsequent proceedings between the same parties concerning the same dispute, of specific issues heard and decided in their previous suit. "Subsequent proceedings may, it is true, include collateral proceedings in the same litigation—a pertinent observation since the dispute in this appeal concerns attorney's fees. Suppose a final judgment were rendered in a plaintiff's favor and later he moved for an

award of attorney's fees or for an order that the defendant disclose the whereabouts of assets needed to pay the judgment. The plaintiff could not in those subsequent, collateral proceedings reopen issues settled by the final judgment, on the ground that the suit was ongoing. The suit would have ended. Collateral proceedings are—collateral. They do not disturb finality. The application of collateral estoppel to prevent relitigation in such proceedings is consistent, therefore, with the principle that collateral estoppel like res judicata applies only when there has been a final judgment.

And yet the principle itself is not unwavering. It is adhered to much more strictly when the issue is the applicability of res judicata than when it is the applicability of collateral estoppel, Restatement (Second) of Judgments § 13, comments a, g (1982), but even there there have been occasional exceptions. See, e.g., *Alyeska Pipeline Service Co. v. United States*, 231 Ct. Cl. 540, 688 F.2d 765 (Ct. Cl. 1982). (There are few generalizations in American law to which there are no exceptions.) Yet a good deal more latitude is allowed when collateral estoppel is invoked rather than res judicata. In *Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979), and *Gilldorn Savings Ass'n v. Commerce Savings Ass'n*, 804 F.2d 390, 393 (7th Cir. 1986), we adopted Judge Friendly's suggestion in *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961), that "whether a judgment, not 'final' in the sense of 28 U.S.C. § 1291, ought nevertheless be considered 'final' in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review.' See also *Avitia v. Metropolitan Club of Chicago, Inc.*, 924 F.2d 689 (7th Cir. 1991); *United States v. Sherman*, 912 F.3d 907, 909 (7th Cir. 1990); Restatement, supra, § 13, comment g. And it is collateral estoppel rather than res judicata to

which the plaintiffs are appealing in this case. New claims or split claims are not in question. The plaintiffs want us to prevent Detrex from relitigating a specific issue, whether response costs include attorneys' fees.

And although, as the "requirement" of a final judgment implies, res judicata or collateral estoppel is normally asserted in a separate case from the one in which the judgment or ruling sought to be used as a bar to further litigation was rendered, there are exceptions to this principle too. See, e.g., *Avitia v. Metropolitan Club of Chicago, Inc., supra; Alyeska Pipeline Service Co. v. United States, supra; Lair v. Oglesby,* 14 F.3d 15, 17 n. 2 (8th Cir. 1993); *Bullen v. de Bretteville,* 239 F.2d 824, 829 (9th Cir. 1956). As one expects, they mainly concern collateral estoppel. Avitia will illustrate. The district judge denied a preliminary injunction, and the disappointed movants could of course have appealed even though there was no final judgment. 28 U.S.C. § 1292 (a)(1). They did not. Instead they renewed their motion for a preliminary injunction. We said that reconsideration of the ground on which the district judge had denied the first motion was barred by collateral estoppel. The movants had had a full and fair opportunity to litigate the issue, and it had been decided in a final, appealable order. They had deliberately delayed in seeking an authoritative resolution.

We must situate the present case in this welter of principles and exceptions. It is helpful to orderly discussion to ask first whether there is a final judgment in the sense of 28 U.S.C. § 1291 and then whether, if not, the absence can be overlooked on the authority of cases such as Avitia.

We did not actually affirm the declaratory judgment that the district judge had issued in December 1992. We reversed in part and remanded for further proceedings, which resulted in the issuance of a new declaratory judgment in April 1994, the month after the attorneys'

fees order was entered. Although the new declaratory judgment was not significantly different from the old one, it was a new, final judgment from which Detrex could have appealed and in fact did appeal. (Its appeal is from both the award of attorney's fees and the second declaratory judgment, although the only relief it seeks concerns the attorney's fees.) Moreover, even if the remand could be ignored, as immaterial to attorney's fees, the propriety of treating as final and appealable a declaratory judgment that declares a right to attorneys' fees in an amount yet to be determined is questionable, to say the least. *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 717 (7th Cir. 1987), compares such a declaration to a ruling on liability, leaving damages for later determination, and points out that such a ruling is not a final, appealable judgment. If so, there was no final judgment in this case when Key Tronic was decided even if the remand for modification of the declaratory judgment is ignored.

We can approach the question slightly differently, though with the same result. Orders concerning attorneys' fees are normally deemed collateral to the litigation in which they are awarded. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 100 L. Ed. 2d 178, 108 S. Ct. 1717 (1988). Probably, therefore, the declaratory judgment should have been deemed to consist of two orders, one declaring Detrex's liability for response costs other than attorney's fees, the other its liability for attorney's fees. Cf. *Szabo v. U.S. Marine Corp., supra,* 819 F.2d at 717. The latter order, though possibly reviewable together with the former under the doctrine of pendent appellate jurisdiction, *id.* at 717, would have been deemed nonfinal until the amount of fees was determined and the fees were ordered paid. *Apex Foundation Sales, Inc. v. Kleinfeld*, 27 F.3d 931, 935-36 (3d Cir. 1994); see also *Szabo v. U.S. Marine Corp., supra,* 819 F.2d at 717. That did not happen until March of 1994.

So either the lawsuit as a whole was still pending when Key Tronic was decided, or the order awarding attorneys' fees—the only part of the lawsuit affected by that decision—was still pending. Either way, there was no final judgment; but we have seen that a final judgment is not an absolute requirement of collateral estoppel. (Another way to put this, though it comes to the same thing, is that finality has a different meaning when the issue is appealability and when the issue is collateral estoppel, or in rare cases res judicata. See Restatement, supra, comment b.) And, superficially at least, the Lummus criteria seem fulfilled in this case. We had decided, upon full hearing and, we thought, with finality, that response costs do include attorneys' fees. Certiorari had been sought and denied. The issue was concluded, and could not have been reexamined by the district court; only the amount of attorneys' fees, not the plaintiffs' entitlement to them, remained for further consideration. We had decided the issue of entitlement "finally."

We had. But Detrex had not exhausted its appellate remedies. The Supreme Court has jurisdiction to review nonfinal decisions by the courts of appeals, 28 U.S.C. § 1254(1); *Forsyth v. Hammond*, 166 U.S. 506, 41 L. Ed. 1095, 17 S. Ct. 665 (1897); 17 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 4036 (2d ed. 1994), such as our decision affirming in part and reversing in part the first declaratory judgment. A denial of certiorari from one of these nonfinal decisions does not preclude a grant of certiorari to review the identical issue at a later stage in the case. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n. 1, 34 L. Ed. 2d 577, 93 S. Ct. 647 (1973); 16 Charles Alan Wright et al., Federal Practice and Procedure § 4004, p. 511 (2d ed. 1994). Clearly, then, this case is not yet final in the eyes of the Supreme Court. If we refuse to apply Key Tronic, Detrex can ask the Supreme Court to grant review and direct us to do so. The Court is quite likely

to oblige, since its policy is to apply new decisions to all cases that were not yet final when the new decision came down. *Harper v. Virginia Dept. of Taxation*, 125 L. Ed. 2d 74, 113 S. Ct. 2510, 2517 (1993); *United States v. Burnom*, 27 F.3d 283 (7th Cir. 1994).

Although judgments that have not yet been, and still can be, appealed, are res judicata (or have collateral-estoppel effect), *Williams v. Commissioner, supra*, 1 F.3d at 504, the reasons are to discourage the filing of a new suit when the loser of the prior suit still has a remedy in that suit, *id.* at 504, and to discourage the parties to dawdle awaiting the decision on appeal of another suit, and neither reason is applicable to a case such as this where the doctrine is invoked in an effort to prevent the loser from exhausting his appellate remedies. Detrex is not bringing a new suit. Nor did it, so far as we can tell, delay the resolution of this suit in the hope that the Supreme Court would bail it out. It is asking us to give it an appellate remedy in its only suit. If we do not, the Supreme Court will.

We admit that there is an element of circularity in relying on this last point, for if we decided that the doctrine of collateral estoppel forbade us to apply Key Tronic, this would furnish an independent basis for a decision not to award the plaintiffs attorney's fees, and if the Court agreed it would not reverse us even if the result was an outcome contrary to Key Tronic. But the essential point is that Detrex should not be deprived of its full appellate remedies in the name of collateral estoppel.

What has made this case complicated to analyze is the apparent merger of law of the case and collateral estoppel that has been brought about by allowing collateral estoppel to be based on judgments that are not final and appealable, that are, therefore, in a sense merely interim rulings, as in this case. For interim rulings are the domain of the law of the case doctrine. As both law of the

case and collateral estoppel are flexible doctrines, classification need not be critical. Both doctrines express a reluctance motivated by a desire to promote the inexpensive and expeditious dispatch of litigation to reopen issues that have been resolved with a fair approach to definitiveness. That definitiveness is missing where as in this case a litigant has not exhausted his appellate remedies—recall that "opportunity for review" was one of the factors mentioned by Judge Friendly in Lummus as bearing on the decision whether to give collateral estoppel effect to a nonfinal order.

It is true as we have noted that exhaustion of appellate remedies is not a normal requirement of res judicata or collateral estoppel. A final judgment by a district court has preclusive effect even though the judgment is pending on appeal. But of course the only preclusion is of other suits, or of specific issues in other suits; the losing party is not precluded from pressing his appeal! Which describes this case. Until our ruling on the scope of response costs became final, Detrex was entitled to pursue its appellate remedies, and hence to obtain the benefit of a favorable decision by the Supreme Court rendered before the pursuit was complete.

The order awarding attorney's fees is REVERSED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S88-620 (RLM)

AMCAST INDUSTRIAL CORPORATION, *et al.*,
Plaintiffs

vs.

DETREX CORPORATION, *et al.*,
Defendants

MEMORANDUM AND ORDER

Plaintiffs Amcast Industrial Corporation and Elkhart Products Corporation (collectively referred to as "Amcast") seek $755,755.57 in attorneys' fees and litigation expenses, $30,636.76 in additional response costs, and $374,013.64 in prejudgment interest. Amcast also moves for oral argument on its motion, but because the court can address Amcast's motion adequately based upon the parties' written submissions, the court denies Amcast's motion for oral argument. For the reasons that follow, Amcast's motion for attorney fees must be granted in part and denied in part.

I. ATTORNEY FEES

Amcast, which bears the burden of establishing the amount of compensable attorney time, *Tomazzoli v. Sheedy*, 804 F.2d 93, 96 (7th Cir. 1986); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 650 (7th Cir. 1985), should have excluded any excessive, redundant, or unnecessary hours from its free request; to the extent that it did not, the court has the power to deduct

such hours from the fees requested. *Tomazzoli v. Sheedy*, 804 F.2d at 96; *Lomas v. Kolb-Lena Cheese Co.*, 720 F. Supp. 110, 113 (N.D. Ill. 1989). Amcast also must use "billing judgment" in submitting its fees—hours not properly billed to one's client should not be billed to one's adversary. *Hutchinson v. Wells*, 719 F. Supp. 1435, 1441 (S.D. Ind. 1989). Such hours include time spent organizing files or reviewing billing records. *Id.*

Amcast's counsel used block billing (grouping a number of tasks together as one entry on the invoice, without breaking down the time spent on each individual task), which poses a challenge to courts:

> [W]here activities are grouped, time should be appropriately apportioned. Otherwise, the court is left with the choice of estimating a portion of the time for a particular activity, or excluding the entire entry. In the interests of justice, the court will opt for the second approach, emphasizing that more detailed documentation would be wise and appropriate in the future.

Claus by Claus v. Goshert, 657 F. Supp. 237, 244 (N.D. Ind. 1987); *see also Hutchinson v. Wells*, 719 F. Supp. at 1441; *Bovey v. City of Lafayette*, 638 F. Supp. 640, 646-47 (N.D. Ind. 1986). Thus, when there is a valid objection to a specific task within a block billing, the court will estimate the time of the objectionable task, and exclude it from the total fee request.

Finally, the court must address Amcast's method of checking citations. Amcast's paralegals apparently do more than simply Shepardize cases; they also "check that the proposition being cited is not being misstated or overstated, which requires a reading and an understanding of both the brief and the caselaw." *See* Amcast's Reply, at 25-26. The court commends Amcast's counsel for its thoroughness of review, but finds the bulk of this time duplicative. Given that Amcast's experienced lead

counsel were charging up to $170 per hour for their services, defendant Detrex Corporation should not have to pay paralegals to insure that Amcast's counsel do not misstate or overstate authority to the court.

Amcast seeks $755,755.57 in attorneys fees and expenses. In support of its motion, Amcast submitted several hundred pages of billing entries and invoices. Detrex maintains that "$352,151.65 is the most that Amcast can recover for attorney fees and litigation expenses." *See* Detrex's Surreply, at 2. Using Amcast's billing entries and invoices, Detrex color-coded more than a thousand individual objections to entries on the billings and invoices.

Fortunately, most of the objections involve questions of law, which Detrex grouped into the following categories: (1) fees incurred with respect to state law claims; (2) fees incurred in the USEPA/Main Street proceedings; (3) fees and expenses that should never have been incurred; and (4) fees and expenses incurred that are not response costs or not consistent with the National Contingency Plan. Unfortunately, other objections—excessive/duplicative time and deficient billing records—must be addressed on an individual basis. These objections will be addressed in turn.

The court will proceed to determine the amount of recoverable attorney fees and litigation expenses in the following manner. The court will presume that the amount Amcast requested—$755,755.57—is a correct figure. Using Detrex's color-coded objections to Amcast's submissions and Detrex's numerous objections, it is the best method for resolving this dispute.

A. State Law Claims (Red Highlights)

In addition to claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), Amcast sued Detrex under state law for

breach of contract, trespass, negligence, strict liability for harm resulting from an abnormally dangerous activity, nuisance, indemnity, and punitive damages. Amcast also brought state law claims against the shareholders, and brought separate state court proceedings against the representing shareholders. Amcast seeks attorney fees for bringing these non-CERCLA actions because these claims arose and depend upon the same core of facts as Amcast's successful CERCLA claim.

Detrex contends that Amcast cannot recover for unsuccessful state law claims brought in this court, or in state court, citing *Gopher Oil Co., Inc. v. Union Oil Co. of California,* 757 F. Supp. 998 (D. Minn. 1991), *aff'd in part and remanded,* 955 F.2d 519 (8th Cir. 1992). In that case, the plaintiff brought an action under CERCLA, MERLA (Minnesota Environmental Response and Liability Act, Minn. Stat. §§ 115B.01-115B.37, Minnesota's counterpart to CERCLA), as well as a number of state common law theories including negligence, nuisance, trespass, and fraud. The court directed a verdict for the defendant on all the state common law claims except fraud; judgment ultimately was rendered for the plaintiff under CERCLA and MERLA, and on the fraud claim. The plaintiff sought recovery of attorney fees incurred in litigating all the claims, but the district court held that the plaintiff could only recover those attorney fees associated with the CERCLA, MERLA, and fraud claims:

> In addition to claims under CERCLA, MERLA, and common law fraud, [the plaintiff's] complaint contained claims based on negligent misrepresentation, negligence, nuisance, trespass, environmental tort and negligence per se. Only the CERCLA, MERLA and fraud claims were allowed to go to the jury. [The plaintiff] has failed to present the court with any authority which would allow recovery

> of attorneys' fees on its non-fraud common law claims. Moreover . . . the United States Supreme Court held that where the plaintiff has failed to prevail on a claim that is distinct in all respects from the successful claims, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee. The court finds no persuasive reason why [the plaintiff] should be allowed to recover attorneys' fees for its non-fraud common law claims.

Gopher Oil Co. v. Union Oil Co. of California, 757 F. Supp. at 1009 (citation and internal quotations omitted).

The United States Court of Appeals for the Eighth Circuit affirmed the district court, but also held that the plaintiff could not recover attorney fees related to the fraud litigation:

> [The defendant] questions the propriety of the award of attorney fees incurred in pursuing the fraud claim because, absent statutory authority, the prevailing party is not entitled to attorney fees. In this case, the successful pursuit of the fraud claim served a purpose overriding the CERCLA and MERLA claims by insulating plaintiff from contribution and making the "as is" clause inapplicable and irrelevant.
>
> Under these circumstances, the defendant should not incur liability for fees related to the fraud claim, notwithstanding the interrelationship of that legal work with the environmental claims. Accordingly, we remand for a redetermination or an apportionment of attorney fees to exclude work related to the fraud litigation.

Gopher Oil Co. v. Union Oil Co. of California, 955 F.2d at 527.

Gopher Oil is closely on point. Like the *Gopher Oil* plaintiff, Amcast brought claims under CERCLA, as

well as claims under state common law. Amcast did not prevail on its state law claims, and has presented no authority that would allow it to recover attorney fees for unsuccessful, distinct state law claims. Moreover, most of the state law claims (such as negligence, trespass, breach of contract, strict liability, nuisance, indemnity, and punitive damges) do not further CERCLA's twin goals of prompt clean-up and imposition of such costs on the responsible party; rather, they simply provide compensation for injury to a party. Accordingly, recovery of attorney fees in this case is not warranted on Amcast's state law claims.

Detrex calculates that the fee entries which relate solely to the state law matters total $17,733.50. The court has reviewed each objection raised by Detrex and calculates a slightly lower figure—$16,673.00. The difference, $1,060.50, is based on the following:

—Smith & Schnake ("S&S") (8/31/89)—Because of block billing, Detrex objects to the total amount of $375.00; the court believes that only $200.00 concerned state matters.

—Faruki, Gilliam & Ireland ("FG&I") (04/5/91) —Detrex's objections total $180.00, not $645.00.

—FG&I (4/30/91)—Detrex's objections total $1,464.50, not $1,465.00.

FG&I (8/5/91)—Detrex objected to $180.00 for discovery requests; no showing that these discovery requests concerned state law matters.

—FG&I (9/6/91)—Because of block billing, Detrex objected to $360.00; the court believes that only $120.00 concerned state matters.

Accordingly, Amcast's fee request will be reduced by $16,673.00.

B. USEPA/Main Street Proceeding (Purple Highlights)

Amcast's billing invoices include entries related to the Main Street Well Field administrative proceedings. In those proceedings; the United States Environmental Protection Agency ("EPA") apparently seeks to hold Amcast responsible for trichloroethylene allegedly migrating from Elkhart Product's property to the Main Street Well Field site. Although the Main Street proceedings are not part of this action, Amcast contends that its investigations and remedial actions are intertwined with this action. Amcast explains that documents in this case were turned over to the EPA for use in the Main Street proceedings. Thus, Amcast contends, attorney fees connected with the Main Street proceedings are recoverable in this action. The court disagrees.

Attorney fees related to the Main Street proceedings are not recoverable because those proceedings are not part of this CERCLA action. Because the court denied Amcast's motion to amend its complaint to include the Main Street proceedings, those proceedings remain outside the pleadings in this case. The parties presented no evidence regarding liability at the Main Street site; the court issued no substantive orders regarding the Main Street site. Finally, Amcast has not cited any authority to support its argument that attorney fees connected with matters outside the pleadings are recoverable.

Detrex calculates that the fee entries which relate to the Main Street proceedings total $85,371.79. The court has reviewed each objection raised by Detrex and calculates a slightly lower figure—$84,236.79. The $1,135.00 difference is based on the following:

> —FG&I (3/21/89)—Because of block billing, Detrex objected to $765.00; the court believes that only $405.00 concerned Main Street proceedings.

—FG&I (3/08/91)—Because of block billing, Detrex objected to $300.00; the court believes that only $120.00 concerned Main Street proceedings.

—Katten, Muchin & Zavis ("KM&Z") (3/31/92) —Detrex objects to $595.00 in facsimile charges; that amount already was accounted for in KM&Z's 4/20/92 invoice.

Accordingly, Amcast's fee request will be reduced by $84,236.79.

C. Certain Expenses Which Should Have Never Been Incurred (Yellow Highlights)

Detrex contends that Amcasts' fee application includes entries for work that never should have been incurred at all, and that Detrex should not have to pay for these matters. *See Hamilton v. Daley*, 777 F.2d 1207, 1213 (7th Cir. 1985) (court should disallow expenses that should not have been incurred at all).

Detrex contends that attorney fees and litigation expenses connected with Amcast's motion for leave to amend the complaint should not have been incurred because Amcast had ample time to amend its complaint before the June 1, 1989 deadline. Detrex also claims that it should not have to pay for Amcast's efforts used in opposing the shareholder's dispositive motions, the related appeal, and the later state court action. Detrex contends this work was unnecessary because Amcast simply could have included the word "operator" in the initial complaint, or amended the complaint before June 1 to include operator liability. Thus, Detrex contends that it should not have to pay for Amcast's pleading errors.

The court agrees that Detrex should not have to pay for the fees incurred in the foregoing matters. With respect to fees incurred by Amcast in attempting to amend its complaint, and in responding to the shareholder's dis-

positive motion, Magistrate Judge Pierce's thorough and reasoned analysis of these issues makes clear that the fees incurred by Amcast were brought on by its own faulty pleadings:

> In this case, the plaintiffs [Amcast] have offered no suitable explanation for their delay in moving to amend, nor have they provided an adequate reason for failing to request leave prior to the June 1, 1989 deadline. Although the plaintiffs' motion suggests that it was occasioned, in part, by an April 1989 EPA study, that again does not explain why the plaintiffs waited until January 30, 1990, eight months after the deadline for amendments and more than six months after the Shareholder Defendants moved for summary judgment, to request leave. Moreover, it is clear that the plaintiffs could have raised their claim that the Former Shareholder defendants were "operators" of EPC's plant in their original complaint and, from all that has been shown, could have raised their claim for contribution prior to the June 1, 1989 deadline.

Amcast Industrial Corp. v. Detrex Corp., 132 F.R.D. 213, 219 (N.D. Ind. 1990).

Detrex also contends that it should not have to reimburse Amcast for work that was never utilized. Amcast's counsel apparently billed Amcast for work on a draft motion for summary judgment that was never filed, and a proposed settlement agreement that was never consummated. The fees incurred for work on these matters are not recoverable. *See United States (EPA) v. Environmental Waste Control, Inc.*, 737 F. Supp. 1485, 1497 (N.D. Ind. 1990) (party not entitled to fees for Rule 11 motion that was never filed).

Detrex calculates that the expenses that should not have been incurred total $62,186.21. The court has reviewed each objection raised by Detrex and calculates a

slightly lower figure—$56,461.86. The difference of $5,724.35 is based upon the following:

KM&Z (3/31/92)—Detrex objects to $1,895.60; the court cannot find the billing invoice to which Detrex objects.

FG&I (1/31/90)—Because of block billing, Detrex objects to the total amount of $735.00; the court believes that only $525.00 concerned amending the complaint.

—FG&I (11/06/90)—Detrex objects to $137.50; the court does not find this amount objectionable.

—FG&I (12/26/90)—Because of block billing, Detrex objects to the total amount of $660.00; the court believes that only $330.00 concerned the shareholder defendants.

—FG&I (12/26/90)—Because of block billing, Detrex objects to the total amount of $1,240.00; the court believes that only $310.00 concerned matters to which Detrex objected.

—FG&I (invoice dated 10/07/91)—Detrex objected to a total of $1,701.25; the court finds that these fees associated with trial preparation are reasonable.

—FG&I (invoice dated 11/06/91)—Detrex objected to a total of $520.00; the court finds that these fees associated with trial preparation are reasonable.

Accordingly, Amcast's fee request will be reduced by $56,461.86.

D. *Fees and Expenses that are not Response Costs or Consistent with the National Contingency Plan (Red Asterisk)*

Detrex objects to certain billing entries, contending that they are not response cost or not consistent with

the National Contingency Plan ("NCP"). Basically, Detrex attempts to narrow the court's earlier opinion which held that attorney fees are recoverable under CERCLA. These objections are not well-taken.

E. *Excessive/Duplicative Time (Orange Highlights)*

Detrex objects to a number of entities as being excessive or duplicative. For example, Detrex claims, among other things, that: $15,000.00 in attorney fees to draft the complaint is excessive; there was too much intra-office communication between Amcast attorneys; there were too many conferences and discussions; there were too many law firms and attorneys working on the case; and paralegals billed too much for cite-checking. Amcast contends that its billings were not excessive or duplicative. Proper analysis of these objections requires an evaluation of the objections individually.

Detrex calculates that the fee entries which are excessive or duplicative total $85,371.79. The court has reviewed each objection raised by Detrex and calculates a lower figure, $17,362.25, as being excessive or duplicative. This lower figure is based upon the following deductions:

SMITH & SCHNAKE

DATE (ATTORNEY)	AMOUNT	REASON
11/11/88 (KM)	$357.50	Organize file—duplicative
11/14/88 (KM)	$ 55.00	Organize file—duplicative
11/17/88 (KM)	$ 96.25	Organize file—duplicative
11/18/88 (AS)	$ 67.50	Review pleadings; complaint only pleading at this point
TOTAL	$576.25	

KATTEN, MUCHIN & ZAVIS

DATE (ATTORNEY)	AMOUNT	REASON
1/20/92 (MCF)	$100.00	No description of misc. expenses

FARUKI, GILLIAM & IRELAND

DATE	(ATTORNEY)	AMOUNT	REASON
11/16/89	(AW)	$ 735.00	Review documents produced by plaintiffs themselves—duplicative
11/17/89	(AW)	$ 630.00	(Same as above)
11/20/89	(AW)	$ 735.00	(Same as above)
11/21/89	(AW)	$ 840.00	(Same as above)
11/28/89	(AW)	$ 630.00	(Same as above)
11/29/89	(AW)	$ 945.00	(Same as above)
11/30/89	(AW)	$ 835.00	(Same as above)
1/12/91	(SKI)	$ 140.00	$50.00/hour to reproduce documents excessive; court will allow $10.00/hour
2/27/91	(MLW)	$ 33.50	Three telephonic conferences on discovery motion excessive; court will allow one conference
3/08/91	(SKI)	$ 50.00	1.75 hours to revise notice of deposition excessive; court will allow .75 hours
4/03/91	(SKI)	$ 430.00	$50.00/hour to reproduce documents excessive; court will allow $10.00/hour
4/04/91	(SKI)	$ 400.00	$50.00/hour to reproduce documents excessive; court will allow $10.00/hour
5/10/91	(EDM)	$ 150.00	6.0 hours to do tasks identified excessive; court will allow 3.0 hours
6/25/91	(SRK)	$ 56.25	Organize documents plaintiffs themselves produced-duplicative
6/26/91	(SRK)	$ 146.25	(Same as above)
6/27/91	(SRK)	$ 123.75	(Same as above)
6/28/91	(SRK)	$ 180.00	(Same as above)
8/01/91	(AW)	$ 1,020.00	11.5 hours to prepare two letters and conduct three telephone conferences excessive; court will allow 3.0 hours
8/14/91	(SKI)	$ 275.00	6.5 hours to cite check excessive; court will allow 1.0 hour

DATE	(ATTORNEY)	AMOUNT	REASON
8/15/91	(SKI)	$ 337.50	8.25 hours to cite check excessive; court will allow 1.5 hours
8/16/91	(SKI)	$ 412.50	9.75 hours to cite check excessive; court will allow 1.5 hours
9/09/91	(SKI)	$ 125.00	3.0 hours to cite check excessive; court will allow .5 hours
/10/91	(SKI)	$ 212.50	5.25 hours to cite check excessive; court will allow 1.0 hour
9/11/91	(SKI)	$ 237.50	5.75 hours to cite check excessive; court will allow 1.0 hour
9/12/91	(SKI)	$ 262.50	6.25 hours to cite check excessive; court will allow 1.0 hour
9/13/91	(SKI)	$ 300.00	7.00 hours to cite check excessive; court will allow 1.0 hour
9/14/91	(SKI)	$ 125.00	3.0 hours to cite check excessive; court will allow .5 hours
9/16/91	(SKI)	$ 237.50	5.75 hours to cite check excessive; court will allow 1.0 hour
9/17/91	(SKI)	$ 412.50	10.25 hours to cite check excessive; court will allow 2.0 hours
10/01/91	(SKI)	$ 387.50	9.25 hours to cite check excessive; court will allow 1.5 hours
10/02/91	(SKI)	$ 125.00	3.5 hours to cite check excessive; court will allow 1.0 hour
10/02/91	(CLH)	$ 237.50	5.75 hours to cite check excessive; court will allow 1.0 hour
10/04/91	(SRK)	$ 123.75	3.75 hours to cite check excessive; court will allow 1.0 hour
10/18/91	(CLH)	$ 125.00	3.5 hours to cite check excessive; court will allow 1.0 hour
10/19/91	(CLH)	$ 212.50	5.25 hours to cite check excessive; court will allow 1.0 hour
10/21/91	(CLH)	$ 275.00	6.5 hours to cite check excessive; court will allow 1.0 hour
10/21/91	(SRK)	$ 225.00	6.0 hours to cite check excessive; court will allow 1.0 hour
11/06/91	(CLH)	$ 250.00	6.0 hours to cite check excessive; court will allow 1.0 hour
11/14/91	(SKI)	$ 362.50	8.75 hours to cite check excessive; court will allow 1.5 hours

DATE	(ATTORNEY)	AMOUNT	REASON
11/15/91	(SKI)	$ 125.00	3.0 hours to cite check excessive; court will allow .5 hours
12/12/91	(SKI)	$ 316.25	6.75 hours to cite check excessive; court will allow 1.0 hour
12/13/91	(SKI)	$ 288.75	6.25 hours to cite check excessive; court will allow 1.0 hour
2/19/92	(CLH)	$ 250.00	6.0 hours to cite check excessive; court will allow 1.0 hour
2/20/92	(CLH)	$ 287.50	6.75 hours to cite check excessive; court will allow 1.0 hour
2/21/92	(CLH)	$ 250.00	6.0 hours to cite check excessive; court will allow 1.0 hour
2/21/92	(CLH)	$ 137.50	3.75 hours to cite check excessive; court will allow 1.0 hour
2/25/92	(CLH)	$ 200.00	5.0 hours to cite check excessive; court will allow 1.0 hour
2/26/92	(CLH)	$ 200.00	5.0 hours to cite check excessive; court will allow 1.0 hour
2/27/92	(CLH)	$ 300.00	7.50 hours to cite check excessive; court will allow 1.5 hours
3/04/92	(SKI)	$ 302.50	6.5 hours to cite check excessive; court will allow 1.0 hour
3/05/92	(SKI)	$ 151.25	3.25 hours to cite check excessive; court will allow .5 hours
3/06/92	(SKI)	$ 137.50	3.5 hours to cite check excessive; court will allow 1.0 hour
3/09/92	(SKI)	$ 151.25	3.75 hours to cite check excessive; court will allow 1.0 hour
3/10/92	(SKI)	$ 247.50	5.5 hours to cite check excessive; court will allow 1.0 hour
TOTAL		$16,686.00	

F. *Deficient Billing Records (Blue Highlights)*

Detrex objects to a number of entries as being deficient because there was an insufficient description of the work performed, there were no times or rates associated with the entry, or there were block billing entries containing objectionable entries. Some of the other objections

coded in blue relate to state law matters, the Main Street Productions, and other previously raised objections. Amcast contends that its entries were not deficient. Proper analysis of these objections requires an evaluation of these objections individually.

Detrex calculates that the fee entries which are deficient total $117,725.56. The court has viewed each objection raised by Detrex and calculates a lower figure, $26,526.96, as being deficient. This lower figure is based upon the following deductions:

SMITH & SCHNAKE

DATE	(ATTORNEY)	AMOUNT	REASON
12/20/85	(RB)	$ 60.00	Review materials re: research validation lawsuit; no showing of connection with this suit
8/07/86	(SRP)	$ 70.00	Insufficient description of work performed
4/15/87	(FLM)	$ 45.00	Insufficient description of work performed
8/30/88	(TF)	$ 427.50	Insufficient description of work performed
8/31/88	(TF)	$ 360.00	Insufficient description of work performed
9/28/88	(AG)	$ 92.50	Insufficient description of work performed
2/21/89	(AWG)	$ 92.50	Insufficient description of work performed
3/21/89-4/5/89	(EAH)	$ 686.25	From Jan. 19 to Jan. 23, 1989, EAH spent 18.5 hours reviewing and summarizing documents; less than 3 months later, EAH spent 15.25 hours reviewing and summarizing documents; this second review is excessive
4/14/89	(TF)	$ 630.00	Block billing; delete 7.0 hours for EPA matter
4/17/89	(DJI)	$ 130.00	Block billing; delete 1.0 hour for EPA matter

DATE	(ATTORNEY)	AMOUNT	REASON
4/18/89	(TF)	$ 90.00	Block billing; delete 1.0 hour for EPA matter
4/18/89	(DJI)	$ 130.00	Block billing; delete 1.0 hour for EPA matter
5/08/89	(TF)	$ 100.00	Block billing; delete 1.0 hour for EPA matter
5/09/89	(TF)	$ 500.00	Block billing; delete 5.0 hours for EPA matter
5/10/89	(DJI)	$ 70.00	Block billing; delete .5 hours for EPA matter
5/19/89	(DJI)	$ 350.00	Block billing; delete 2.5 hours for EPA matter
5/23/89	(DJI)	$ 70.00	Block billing; delete .5 hours for EPA matter
6/05/89	(TF)	$ 50.00	Block billing; delete .5 hours for EPA matter
6/08/89	(DJI)	$ 140.00	Insufficient description of work performed
7/06/89	(AWG)	$ 185.00	Insufficient description of work performed
7/10/89	(AWG)	$ 555.00	Insufficient description of work performed
7/11/89	(AWG)	$ 185.00	Insufficient description of work performed
7/12/89	(AWG)	$ 370.00	Insufficient description of work performed
7/18/89	(TF)	$ 46.25	Insufficient description of work performed
7/20/89	(CM)	$ 110.00	Block billing; delete 1.0 hour for shareholder matter
7/25/89	(CM)	$ 220.00	Block billing; delete 2.0 hours for shareholder matter
7/25/89	(TF)	$ 300.00	Block billing; delete 3.0 hours for shareholder matter and non-response cost matter
8/23/89	(EAH)	$ 125.00	Insufficient description of work performed
9/05/89	(EAH)	$ 50.00	Insufficient description of work performed; work appears to be related to shareholder matter

DATE	(ATTORNEY)	AMOUNT	REASON
9/06/89	(BS)	$ 40.00	Insufficient description of work performed; work appears to be related to shareholder matter
9/08/89	(EAH)	$ 125.00.	Insufficient description of work performed; work appears to be related to shareholder matter
TOTAL		$ 6,405.00	

BERICK, PEARLMAN & MILLS

DATE	(ATTORNEY)	AMOUNT	REASON
2/06/91	(FIRM)	$286.19	Insufficient description of work performed
1/15/91	(FIRM)	$198.42	Insufficient description of work performed
TOTAL		$484.61	

FARUKI GILLIAM & IRELAND

DATE	(ATTORNEY)	AMOUNT	REASON
12/06/89-12/14/89	(AW)	$ 1,785.00	AW worked 17 hours reviewing documents and preparing chronology of significant events; this is not a reasonable fee that should be paid by defendant
1/23/90	(AW)	$ 105.00	Block billing; delete 1.0 hour for unrelated matter—conference with paralegals regarding cite checking
2/12/90	(AW)	$ 26.25	Insufficient description of work performed; delete .25 hours
2/15/90	(AW)	$ 26.25	Insufficient description of work performed
4/23/90	(SKI)	$ 40.00	$50.00/hour to copy documents excessive; court will allow $10.00/hour
2/15/91	(AW)	$ 240.00	Insufficient description of work performed
2/26/91	(MLW)	$ 65.00	Insufficient description of work performed
2/28/91	(MLW)	$ 32.50	Insufficient description of work performed

DATE	(ATTORNEY)	AMOUNT	REASON
3/01/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for state law matter
3/04/91	(AW)	$ 60.00	Block billing; delete .5 hours for state law matter
3/04/91	(DJI)	$ 77.50	Block billing; delete .5 hours for EPA matter
3/05/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for EPA matter
3/07/91	(AW)	$ 30.00	Block billing; delete .25 hours for EPA matter
3/10/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for EPA and state law matters
3/11/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for EPA, state law, and other matters
3/12/91	(SKI)	$ 80.00	$50.00/hour to copy documents excessive; court will allow $10.00/hour
3/13/91	(AW)	$ 90.00	Block billing; delete .75 hours for non-recoverable matters
3/19/91	(PLC)	$ 35.00	$45.00/hour to copy documents excessive; court will allow $10.00/hour
4/01/91	(AW)	$ 300.00	Block billing; delete 2.5 hours for state law and other matters
4/04/91	(MLW)	$ 65.00	Block billing; delete 1.0 hour for state law and other matters
4/10/91	(MLW)	$ 65.00	Block billing; delete 1.0 hour for state law matters
4/11/91	(MLW)	$ 97.50	Block billing; delete 1.5 hours for state law matters
4/15/91	(AW)	$ 120.00	Block billing; delete 1.5 hours for non-recoverable matters
4/16/91	(AW)	$ 240.00	Block billing; delete 2.0 hours for state law matters
4/17/91	(DJI)	$ 310.00	Block billing; delete 2.0 hours for state law and other matters
4/17/91	(AW)	$ 420.00	Block billing; delete 3.5 hours for state law and other matters

DATE	(ATTORNEY)	AMOUNT	REASON
4/18/91	(DJI)	$ 116.25	Block billings; delete .75 hours for state law matters
4/18/91	(AW)	$ 300.00	Block billing; delete 2.5 hours for state law matters
4/23/91	(EDM)	$ 40.00	$50.00/hour to copy documents excessive; court will allow $10.00/hour
4/24/91	(DJI)	$ 155.00	Block billing; delete 1.0 hour for state law and other matters
5/30/91	(DJI)	$ 38.75	Block billing; delete .25 hours for state law matters
5/08/91	(DJI)	$ 77.50	Block billing; delete .5 hours for state law matters
5/14/91	(DJI)	$ 155.00	Block billing; delete 1.0 hour for state law matters
5/14/91	(AW)	$ 180.00	Block billing; delete 1.5 hours for state law matters
5/15/91	(DJI)	$ 77.50	Block billing; delete .5 hours for EPA matters
5/17/91	(AW)	$ 240.00	Block billing; delete 2.0 hours for state law matters
5/18/91	(AW)	$ 300.00	Block billing; delete 2.5 hours for state law matters
5/20/91	(DJI)	$ 38.75	Block billing; delete .25 hours for state law matters
5/22/91	(DJI)	$ 77.50	Block billing; delete .5 hours for state law matters
6/05/91	(AW)	$ 60.00	Block billing; delete .5 hours for state law matters
6/05/91	(MLW)	$ 56.25	Block billing; delete .75 hours for state law matters
6/06/91	(AW)	$ 60.00	Block billing; delete .5 hours for state law matters
6/06/91	(DJI)	$ 77.50	Block billing; delete .5 hours for state law matters
6/07/91	(AW)	$ 60.00	Block billing; delete .5 hours for state law matters
6/10/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for state law matters

DATE	(ATTORNEY)	AMOUNT	REASON
6/11/91	(AW)	$ 600.00	Block billing; delete 5.0 hours for state law matters
6/11/91	(DJI)	$ 310.00	Block billing; delete 2.0 hours for state law matters
6/17/91	(SSS)	$ 33.75	Block billing; delete .75 hours for state law matters
6/17/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for state law matters
6/20/91	(SSS)	$ 90.00	Block billing; delete 2.0 hours for state law matters
6/24/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for state law matters
6/25/91	(SSS)	$ 157.50	Block billing; delete 3.5 hours for state law matters
6/26/91	(DJI)	$ 77.50	Block billing; delete .5 hours for state law matters
7/01/91	(SSS)	$ 135.00	Block billing; delete 3.0 hours for state law matters
7/03/91	(DJI)	$ 320.00	Block billing; delete 2.0 hours for state law matters
7/05/91	(DJI)	$ 531.25	Block billing; delete .75 hours for state law matters
7/08/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for state law matters
7/10/91	(AW)	$ 60.00	Block billing; delete .5 hours for EPA matters
7/12/91	(DJI)	$ 160.00	Block billing; delete 1.0 hour for state law matters
7/15/91	(AW)	$ 60.00	Block billing; delete .5 hours for state law matters
7/22/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for EPA matters
7/23/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for EPA matters
7/26/91	(SSS)	$ 168.75	Block billing; delete 3.75 hours for state law matters
7/30/91	(DJI)	$ 40.00	Block billing; delete .25 hours for state law matters
8/01/91	(SRK)	$ 22.50	Block billing; delete .5 hours for state law matters

DATE	(ATTORNEY)	AMOUNT	REASON
8/04/91	(AW)	$ 360.00	Block billing; delete 3.0 hours for state law matters
8/29/91	(MLW)	$ 75.00	Block billing; delete 1.0 hour for state law matters
8/30/91	(MLW)	$ 225.00	Block billing; delete 3.0 hours for state law matters
9/03/91	(MLW)	$ 150.00	Block billing; delete 2.0 hours for state law matters
9/03/91	(AW)	$ 60.00	Block billing; delete .5 hours for state law matters
9/04/91	(MLW)	$ 75.00	Block billing; delete 1.0 hour for state law matters
9/10/91	(MLW)	$ 112.50	Block billing; delete 1.5 hours for state law matters
9/11/91	(MLW)	$ 150.00	Block billing; delete 2.0 hours for state law matters
9/19/91	(JDF)	$ 480.00	Insufficient description of work performed
9/20/91	(JDF)	$ 465.00	Insufficient description of work performed
9/23/91	(MLW)	$ 360.00	Delete 6.0 hours; insufficient description of work performed
9/24/91	(MLW)	$ 300.00	Delete 5.0 hours; insufficient description of work performed
10/11/91	(JDF)	$ 180.00	Block billing; delete 3.0 hours for state law matters
10/14/91	(JDF)	$ 180.00	Block billing; delete 3.0 hours for state law matters
10/22/91	(MLW)	$ 150.00	Block billing; delete 2.0 hours for state law matters
10/23/91	(MLW)	$ 150.00	Block billing; delete 2.0 hours for state law matters
10/24/91	(AW)	$ 120.00	Block billing; delete 1.0 hour for state law matters
11/05/91	(CLH)	$ 75.00	Block billing; 2.0 hours to cite check excessive; court will allow .5 hours
11/05/91	(JDF)	$ 120.00	Block billing; delete 2.0 hours for state law matters

DATE	(ATTORNEY)	AMOUNT	REASON
11/06/91	(JRT)	$ 60.00	Block billing; delete 1.0 hour for state law matters
11/07/91	(JDF)	$ 180.00	Block billing; delete 3.0 hours for state law members
11/07/91	(CLH)	$ 125.00	Block billing; 3.5 hours to cite check excessive; court will allow 1.0 hour
11/07/91	(JRT)	$ 240.00	Block billing; delete 4.0 hours for state law matters
11/12/91	(JDF)	$ 150.00	Block billing; delete 2.5 hours for state law matters
11/14/91	(MLW)	$ 356.25	Block billing; delete 4.75 hours for state law matters
11/14/91	(DJI)	$ 240.00	Block billing; delete 1.5 hours for state law matters
11/14/91	(JDF)	$ 420.00	Block billing; delete 7.0 hours for state law matters
11/14/91	(CLH)	$ 200.00	Block billing; 5.0 hours to cite check excessive; court will allow 1.0 hour
11/14/91	(AW)	$ 210.00	Block billing; delete 1.75 hours for state law matters
11/15/91	(MLW)	$ 300.00	Block billing; delete 4.0 hours for state law matters
11/15/91	(DJI)	$ 40.00	Block gilling; delete .25 hours for state law matters
11/15/91	(CLH)	$ 150.00	Block billing; 4.0 hours to cite check excessive; court will allow 1.0 hour
11/15/91	(AW)	$ 240.00	Block billing; delete 2.0 hours for state law matters
11/16/91	(JDF)	$ 285.00	Block billing; delete 4.75 hours for state law matters
11/16/91	(AW)	$ 180.00	Block billing; delete 1.5 hours for state law matters
11/17/91	(DJI)	$ 240.00	Block billing; delete 1.5 hours for state law matters
11/17/91	(AW)	$ 240.00	Block billing; delete 2.0 hours for state law matters

DATE	(ATTORNEY)	AMOUNT	REASON
11/18/91	(MLW)	$ 187.50	Block billing; delete 2.5 hours for state law matters
11/18/91	(DJI)	$ 160.00	Block billing; delete 1.0 hour for state law matters
11/18/91	(JDF)	$ 120.00	Block billing; delete 2.0 hours for state law matters
2/20/92	(CLH)	$ 225.00	Block billing; 4.5 hours to cite check excessive; court will allow 1.0 hour
TOTAL		$18,722.50	

THOMPSON, HINE & FLORY

DATE	(ATTORNEY)	AMOUNT	REASON
1/16/90	(JWB)	$108.75	Block billing; delete .75 hours for EPA matter
2/02/90	(KM)	$ 60.00	Block billing; delete 1.0 hour for EPA matter
2/07/90	(JEG)	$ 56.25	Block billing; delete .75 hours for unrelated matter
2/08/90	(JEG)	$225.00	Block billing; delete 3.0 hours for unrelated matter
2/12/90	(JEG)	$ 75.00	Block billing; delete 1.0 hour for unrelated matter
2/14/90	(JWB)	$108.75	Block billing; delete .75 hours for unrelated matter
2/14/90	(JEG)	$ 18.75	Block billing; delete .25 hours for unrelated matter
3/28/90	(FIRM)	$152.35	Insufficient description of work performed; appears to be unrelated matter
1/08/90	(CM)	$ 13.75	Block billing; delete for unrelated matter
1/23/90	(JWB)	$ 36.25	Block billing; delete .25 hours for unrelated matter
1/25/90	(KM)	$ 60.00	Block billing; delete 1.0 hour for unrelated matter
TOTAL		$914.85	

G. *Total Attorney Fees*

Amcast is entitled to $554,494.71 in attorney fees, calculated as follows:

	Total Fees Requested	$755,755.57
Less:		
(1) State Law Claims	$16,673.00	
(2) USEPA/Main Street Proceeding	$84,236.79	
(3) Expenses which should not have been incurred	$56,461.86	
(4) Fees and Expenses that are not Response Costs or not Consistent with the NCP	$ 0.00	
(5) Excessive/duplicative time	$17,362.25	
(6) Deficient Billing Records	$26,526.96	
	Less Deductions	—$201,260.86
	TOTAL FEE AWARD	$554,494.71

II. ADDITIONAL RESPONSE COSTS

Amcast seeks $30,636.76 in additional response costs incurred between November 23, 1991 and April 30, 1992. Charles Rytlewski, Elkhart Product Corporation's controller, affirms that EPC and Amcast expended $6,413.55 on system service charges (sewer and utilities); $1,893.12 on labor expenses; $17,067.09 on consultants (investigation, design, monitoring); and $5,263.00 on equipment, installation, and monitoring costs. The court finds these additional response costs reasonable, and Amcast is entitled to recover these additional response costs.

III. PREJUDGMENT INTEREST

Amcast seeks to recover $374,013.64 in prejudgment interest. This figure includes $314.912.76 in interest on the April 9, 1992 judgment; $446.71 in interest on the additional response costs; and $58,654.17 in interest on the attorney fees and litigation expenses incurred. Detrex does not object to Amcast's calculation of prejudgment

interest on the April 9 judgment or the additional response costs. The amount of prejudgment interest on the attorney fees and litigation expenses will have to be recalculated consistent with this opinion.

Accordingly, Amcast is entitled to $315,359.47 in prejudgment interest, and will be ordered to recalculate the prejudgment interest on the attorney fees and litigation expenses consistent with this opinion.

IV. CONCLUSION

Given the massive volume of the fee petition and the equally huge number of objections, the court has tried to evaluate each fee entry for its reasonableness and consistency with CERCLA's goal—that being the "prompt, thorough, and cost-effective cleanup of a hazardous waste site." *Woodman v. United States*, 764 F. Supp. 1467, 1470 (M.D. Fla. 1991).

Accordingly, the court GRANTS Amcast's motion for attorney fees and litigation expenses, additional response costs, and prejudgment interest (filed June 4, 1992), and ORDERS Detrex Corporation to pay the plaintiffs $554,494.71 in attorneys fees and litigation expenses, $30,636.76 in additional response costs, and $315,359.47 in prejudgment interest. The court also ORDERS the plaintiffs to recalculate the prejudgment interest on the attorney fees and litigation expenses consistent with this opinion, and resubmit that figure to the court within fifteen (15) days of the date of this order.

The court DENIES Amcast's motion for oral argument (filed October 16, 1992).

SO ORDERED.

ENTERED: March 30, 1994

/s/ Robert L. Miller, Jr.
ROBERT L. MILLER, JR.
Judge
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case Number: S88-620 RLM

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION

v.

DETREX CORPORATION, *et al.*

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED BY ROBERT L. MILLER, JR. that Detrex Corporation is to pay the plaintiffs $554,494.71 in attorneys fees and litigation expenses, $30,636.76 in additional response costs, and $315,359.47 in prejudgment interest. The plaintiffs are to recalculate the prejudgment interest on the attorney fees and litigation expenses and resubmit that figure to the court within 15 days of date of order (Memorandum and Order entered March 31, 1994).

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

Date March 31, 1994

GERALDINE J. CROCKETT
Clerk

/s/ Carol Farmer
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 5, 1994

Before
Hon. Richard A. Posner, Chief Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

No. 94-2026

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Plaintiffs-Appellees,
v.

DETREX CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division

No. 88 C 620 Robert L. Miller, Jr., *Judge*

ORDER

Before us is a motion by the appellees to dismiss portions of the appeal as barred by the doctrines of res judicata or, more plausibly, law of the case. In a previous

appeal, this panel held the appellate, Detrex, "was liable [to the appellees] under the Superfund statute for the spillage from its own trucks," as the district court had found, but reversed another part of the judgment and remanded the case for further proceedings consistent with our opinion. 2 F.3d 746, 751 (7th Cir. 1993). The district judge then entered a judgment requiring Detrex to pay response costs, including attorneys' fees, and Detrex again appealed. The appellees have moved to dismiss so much of the appeal as seeks to (1) excuse Detrex from any liability for response costs, on the ground that the appellees had failed to comply with the National Contingency Plan, and (2) excuse Detrex from having to pay attorneys' fees.

The motion is well taken with respect to (1). Detrex is seeking to relitigate the issue of its liability for response costs, which was settled by our previous decision. It is true that our opinion does not mention the NCP issue, but in upholding Detrex's liability for response costs we necessarily rejected every ground on which Detrex had opposed that liability. If Detrex thought we had somehow overlooked that ground, it should have filed a petition for rehearing. It did not.

With respect to (2), an intervening Supreme Court decision has strengthened Detrex's argument that it is not liable for attorneys' fees, and the law of the case doctrine does not bar reconsideration of any issue when there has been an intervening change in law.

The motion to dismiss the appeal is granted in part and denied in part, as indicated.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 92-2365

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Plaintiffs-Appellees,

v.

DETREX CORPORATION,
Defendant-Appellant.

Argued Jan. 4, 1993
Decided Aug. 12, 1993

Before POSNER, FLAUM, and KANNE, Circuit Judges.

POSNER, Circuit Judge.

This appeal requires us to explore the outer limits of the "Superfund" statute—the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* We must decide whether, as the district court concluded, the Act extends to any chemical spill that creates an environmental hazard. 779 F.Supp. 1519. This is an important question that has not until now been the subject of an appellate case. Our conclusion is that the spiller, but not the shipper of the chemical that spilled, is within the Act's long reach.

The facts are simple enough, and we shall make them even simpler where we can do so without affecting the analysis. The principal plaintiff, Elkhart (Amcast is its parent, and can be ignored), manufacturers copper fittings at a plant in Indiana. One of the chemicals that it uses in the manufacturing process is the solvent trichloroethylene (TCE). Elkhart used to buy TCE in liquid form from a number of chemical maufacturers, including the defendant, Detrex. Detrex sometimes delivered the solvent in its own tanker trucks and sometimes hired a common carrier, Transport Service, to deliver it. In 1984, TCE was discovered in the groundwater beneath a pharmaceutical plant adjacent to Elkhart's plant. There is evidence that both Detrex's and Transport Services' drivers sometimes spilled TCE accidentally on Elkhart's premises while trying to fill Elkhart's storage tanks and that some of this spillage found its way into the groundwater beneath the pharmaceutical plant, although an expert hired by Detrex has estimated that out of almost 800 gallons of TCE that have been found in the soil and groundwater beneath the pharmaceutical plant, no more than 49 came from these delivery spills, the rest having leaked from the storage tanks or a waste-disposal pit or the plant itself or been spilled by other suppliers' drivers.

The Superfund statute, so far as bears on this case, imposes liability for "response costs" (the costs of eliminating an environmental hazard) on the "owner and operator of a . . . facility" from which a hazardous substance has been released, § 9607(a)(1), and on "any person who by contract . . . arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person." § 9607(a)(3). "Facility" is broadly defined as "(A) any building, structure, installation, equipment, pipe or pipeline . . . , well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle rolling stock, or aircraft, or (B)

any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." § 9601(9). Elkhart is admittedly a "responsible person," as an entity liable for response costs is called; but the statute permits one responsible person to recover all or part of its response costs from another. § 9607(a)(4)(B). Having spent more than $1 million on cleaning up the contamination caused by the spillage of TCE from its facility, Elkhart brought this suit to establish that Detrex was a responsible person, too, and to shift Elkhart's response costs (that is, the $1 million it had incurred in cleaning up the contamination) from itself to Detrex.

A potentially responsible person who, like Detrex, has been sued is entitled to seek, by way of counterclaim, contribution from the plaintiff for the amount of response costs fairly attributable ot the conduct of the plaintiff as distinct from that of the defendant. § 9613(f). Rather than file a counterclaim against Elkhart, Detrex argued to the district judge that in the course of adjudicating Elkhart's claim he had to apportion responsibility for the costs between the parties. The judge rejected this argument, together with Detrex's more fundamental argument that it is not a responsible person within the meaning of the statute, and entered judgment in favor of Elkhart for the entire response costs that Elkhart had incurred. 822 F.Supp. 545. Eventually Detrex filed a separate action for contribution from Elkhart; that suit is pending in the district court. § 9613(f)(1); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571 n.2 (6th Cir.1991). Detrex was entitled to proceed in that fashion. The statute is explicit that a counterclaim for response costs is not compulsory, §§ 9613(f)(1), (g)(3)(A), a result consistent with general law, since Detrex's claim against Elkhart, dependent as it was on Elkhart's establishing Detrex's liability to it, had not matured when Elkhart's suit was filed. Fed.R.Civ.P. 13(a); *Harbor Ins. Co. Continental Bank Corp.*, 922 F.2d 357,

360 (7th Cir.1990); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practices and Procedure* § 1411 at p. 83 (2d ed. 1990).

The argument that the judge had to apportion liability between Detrex and Elkhart in Elkhart's suit makes no sense, so we dispatch it at the outset. The statute is clear that whoever (like Elkhart) incurs costs in cleaning up a contaminated site can seek to recover them from any responsible person, and if the responsible person believes as Detrex does that his contribution to the mess was trivial and wants the point established promptly he can counterclaim for as large a percentage of the costs as he thinks he can prove was due to the plaintiff's own conduct. *United States v. R.W. Meyer, Inc., supra,* 932 F.2d at 571 n.2; *United States v. Mexico Feed & Seed Co.,* 764 F.Supp. 565, 573 (E.D.Mo.1991), rev'd in part on other grounds, 980 F.2d 478 (8th Cir.1992). The counterclaim if promptly filed will doubtless be tried at the same time as the main claim, so the defendant will at no time be out of pocket by more than the share of the response costs attributable to his own conduct. Obviously Detrex could have counterclaimed without giving up its main argument—that it is not a responsible person and therefore is not liable for any part of the response costs. We do not know why it waited and filed a separate suit.

The difficult question is whether Detrex is within the grasp of the Superfund law at all; if not, Elkhart's suit must fail irrespective of any division of responsibilities between Elkhart and Detrex. Elkhart argues that Detrex has forfeited this ground of appeal by failing to present it to the district court. Detrex had argued to the district court on a variety of grounds that it was not liable to the plaintiff under that law, and one of these grounds was that it was not an arranger for disposal or treatment. The fact that it did not marshal in support of this ground all the relevant legislative provisions and history did not work a forfeiture. *Dawson v. General Motors Corp.,* 977

F.2d 369, 372 n. * (7th Cir.1992); *Locke v. Bonello,* 965 F.2d 534, 536 n. 1 (7th Cir.1992); cf. *Bellotti v. Baird,* 428 U.S. 132, 143 n. 10, 96 S.Ct. 2857, 2864 n. 10, 49 L.Ed.2d 844 (1976); but see *Elder v. Holloway,* 975 F.2d 1388, 1392-93 (1991), rehearing en banc denied, 984 F.2d 991 (9th Cir.1993) (per curiam), cert. granted, —— U.S. ——, 113 S.Ct. 3033, 125 L.Ed.2d 721 (1993). But Detrex tacitly conceded in the district court that it was, though not an arranger for disposal, an owner of a facility, within the meaning of the statute. Detrex thus conceded a ground that it now seeks to raise with us, that it was not an owner of a facility; and failure to have presented to the district court a ground on which reversal is being urged is a more serious matter than failing to support a ground with the arguments or authorities that the appellate court finds persuasive. The rule in civil cases is that except with regard to jurisdictional issues and issues involving comity —the mutual respect owed by soverigns and quasi-sovereigns, such as the states—a ground not raised in the district court cannot be used to reverse that court, *Old Republic Ins. Co. v. Federal Crop Ins. Corp.,* 947 F.2d 269, 276-77 (7th Cir.1991); *Zbaraz v. Hartigan,* 763 F.2d 1532, 1544 (7th Cir.1985), aff'd by an equally divided Court under the name *Hartigan v. Zbaraz,* 484 U.S. 171, 108 S.Ct. 479, 98 L.Ed.2d 478 (1987). The Supreme Court has told us, however, that the rule is not absolute, *Singleton v. Wulff,* 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); see also *Arcadia v. Ohio Power Co.,* 498 U.S. 73, 77, 111 S.Ct. 415, 418, 112 L.Ed.2d 374 (1990); *id.* at 86, 111 S.Ct. at 422 (concurring opinion); *U.S. National Bank v. Independent Insurance Agents of America, Inc.,* —— U.S. ——, ——-—— 113 S.Ct. 2173, 2178-79, 124 L.Ed.2d 402 (1993), a point upon which we have built in carving an exception for plain errors in civil cases. (The civil rules contain no counterpart to Rule 52(a) of the criminal rules, which allows reversal on the basis

of plain errors even if they had not been drawn to the attention of the trial court.) *Deppe v. Tipp,* 863 F.2d 1356, 1362 (7th Cir.1988). Occasional flat statements in our cases that there is no plain error doctrine in civil cases, e.g., *United States v. Caputo,* 978 F.2d 972, 974 (7th Cir.1992), which puzzled the court in *Hudak v. Jepsen of Illinois,* 982 F.2d 249, 251 n. 1 (7th Cir. 1992), implicitly refer to error *in jury instructions,* a setting to which Rule 51 of the civil rules has been interpreted to make the doctrine of plain error inapplicable. *Deppe v. Tripp, supra,* 863 F.2d at 1361-62.

Forfiture is a sanction, and sanctions should be related to harm done or threatened. In the rare case in which failure to present a ground to the district court has caused no one—not the district judge, not us, not the appellee—any harm of which the law ought to take note, we have the power and the right to permit it to be raised for the first time to us. *Rosser v. Chrysler Corp.,* 864 F.2d 1299, 1306 n. 7 (7th Cir.1988); *Charlton v. United States,* 743 F.2d 557, 561 n. 5 (7th Cir.1984) (per curiam). This is a suitable case in which to exercise our power of lenity. The new ground is fully argued in the brief of the appellant, so that Elkhart had—and it took—a full opportunity to respond. The ground rests entirely on a pure issue of statutory interpretation, as to which the district judge's view, while it would no doubt be interesting, could have no effect on our review, which is plenary on matters of law. It is unrealistic to think that if Detrex had made the argument to the district court and prevailed, there would have been no appeal. The appeal just would have been filed by Elkhart rather than by Detrex. The issue having been fully briefed and argued, there is no reason to defer its resolution to another case. There will be no better time to resolve the issue than now.

Each of the tanker trucks owned by Detrex in which it delivered TCE to Elkhart constituted prima facie a

"facility" within the meaning of the Superfund law, § 9601(9)(A), contained a hazardous substance, namely TCE, and "disposed of" it when the truck spilled it, because the statute defines disposal to include spilling. §§ 6903(3), 9601(29). The statutory definition of facility excludes, however, a "consumer product in consumer use." § 9601(9). Neither party suggests that the term "consumer product" is limited to products used by consumers as distinct from ones consumed by business firms and other institutions. *Dayton Independent School District v. U.S. Mineral Products Co.*, 906 F.2d 1059, 1065-66 (5th Cir.1990), holds, correctly in our view, that asbestos products incorporated into walls and ceilings of school buildings are consumer products within the meaning of the Superfund law. The difficult question is whether the reference to consumer product in section 9601(9), the definition of "facility," is to be read literally.

If it is read literally, the only consumer product exempted by the statute is the consumer product that is a facility. The alternative is to read the exemption as referring to facilities that *contain* consumer products. Under this alternative reading, as long as Elkhart was using TCE in its plant in the ordinary course, with no spills or leaks, it was not the owner of a "facility" within the meaning of the statute. The *Dayton* decision even suggests that the school buildings themselves might have been consumer products within the meaning of the statute, 906 F.2d at 1065, n. 4, and likewise Elkhart's plant, so long as it was merely manufacturing useful products and not creating hazardous wastes. That, however, would be an extraordinarily strained reading of "consumer product."

Once Elkhart finished using the TCE in its manufacturing process—once consumer use passed over into waste disposal, as happened when Elkhart dumped the used TCE into a waste-disposal pit on its premises—Elkhart became, if the statutory reference to a facility that is a consumer product is interpreted to mean a facility that

contains a consumer product, a responsible person, as a facility owner no longer sheltered by the exception for consumer products in consumer use. Continuing with this interpretation of the consumer-product exception, and assuming reasonably enough that the transportation of a consumer product to the customer is as much a consumer use as the consumption of the product in the customer's manufacturing process (the trucks themselves might be thought consumer products, within the extended meaning attached to this term in the *Dayton* footnote, but we reject so strained an interpretation of the term), we would conclude that until the TCE transported in Detrex's trucks spilled, it was a consumer product in consumer use. It ceased to be in consumer use when it spilled; but the spilled TCE was no longer in the trucks or any other property owned by Detrex, and when it hit the ground it was in premises owned by Elkhart, and Elkhart thus became the facility owner and a responsible person.

This approach does excessive violence to the statutory language. The exception is for facilities that *are* consumer products in consumer use, not for consumer products contained in facilities. Although read as it is written the exception is narrow, it is not meaningless, for the statute defines "facility" so broadly that it could be thought to include a can of lye. Since Detrex, not Elkhart, was responsible for the environmental damage resulting from the spillage of TCE from Detrex's trucks, there is no anomaly, so far as the purpose of the Superfund statute is concerned, in deeming Detrex a responsible person along with Elkhart. A literal interpretation that furthers the statute's purpose is hard to beat.

Irrespective of the issue of consumer product and consumer use, however, Detrex was a responsible person with respect to the TCE that was spilled by trucks owned by Transport Services to carry the stuff to the Elkhart plant Detrex "arranged with a transporter for transport

for disposal or treatment" of TCE. § 9607(a)(3). Detrex hired a transporter, all right, but it did not hire it to spill TCE on Elkhart's premises. Although the statute defines disposal to include spilling, the critical words for present purposes are "arranged for." The words imply intentional action. The only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart's storage tanks. It did not arrange for spilling the stuff on the ground. No one arranges for an accident, except in the sinister sense, not involved here, of "staging" an accident—that is, causing deliberate harm but making it seem accidental.

Statutes sometimes use words in nonstandard senses, and do so without benefit of a definitional section. (The Superfund statute does not define "arrange for.") Elkhart argues that we can tell that Congress was doing that here because the provision in question speaks of "disposal" and we know that "disposal" includes accidentally spilling. But since context determines meaning, the same word can mean different things in different sentences—to monopolize a conversation doesn't mean the same thing as to monopolize the steel industry—even in the same statute, especially when the statute does not attempt to impose a single meaning by defining the word. In the context of the operator of a hazardous-waste dump, "disposal" includes accidental spillage; in the context of the shipper who is arranging for the transportation of a product, "disposal" excludes accidental spillage because you do not arrange for an accident except in the Esopian sense illustrated by the staged accident.

The words "arranged with a transporter for transport for disposal or treatment" appear to contemplate a case in which a person or institution that wants to get rid of its hazardous wastes hires a transportation company to carry them to a disposal site. If the wastes spill en route, then since spillage is disposal and the shipper had arranged for disposal—though not in that form—the ship-

per is a responsible person and is therefore liable for clean-up costs. But when the shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a useful product, he is not a responsible person within the meaning of the statute and if a mishap occurs en route his liability is governed by other legal doctrines. It would be an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers or other reputable transportation companies that the shippers had hired in good faith to ship their products. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174, 1180-81 (7th Cir.1990). The language of the statute permits but does not compel such a result, and we can find no evidence that it was intended.

This conclusion does not create a regulatory void. Apart from common law liability of transportation companies for chemical spills, noted in our *Indiana Habor Belt R.R.* decision, there are a variety of direct regulatory controls over the transportation of hazardous substances, illustrated by the Hazardous Materials Transportation Act, 49 U.S.C.App. §§ 1801 *et seq.* And Elkhart was responsible for the cost of cleaning up the contamination resulting from the spillage from Transport Service's trucks if it couldn't find any other responsible persons to whom to shift that cost in whole or in part.

We conclude that Detrex was liable under the Superfund statute for the spillage from its own trucks (though it may be able to shift some of that liability back to Elkhart by means of its suit for contribution) but not the spillage from the trucks of the common carrier that it hired. The judgment for Elkhart is therefore affirmed in part and reversed in part and the case remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

UNITED STATES DISTRICT COURT
N.D. INDIANA
SOUTH BEND DIVISION

No. S88-620 (RLM)

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION

v.

DETREX CORPORATION

April 9, 1992

MEMORANDUM AND ORDER

MILLER, District Judge.

Following the order of November 18, 1991 granting in part and denying in part the parties' cross-summary judgment motions, the court continued the trial and afforded the plaintiffs, Amcast Industrial Corporation and Elkhart Products Corporation (collectively "Amcast"), until December 16 to move for partial summary judgment on the issue of damages. Amcast has filed its motion, and the briefing is now complete. The court assumes familiarity with the facts set forth in the November 18 order and with the procedural history of this case. 779 F.Supp. 1519.

The court acknowledges both parties' requests for oral argument on this motion, but declines to hold an oral argument in light of the court's heavy calendar be-

tween now and the scheduled trial and the court's familiarity with the case.

At the pretrial conference held on November 25, 1991, the plaintiffs indicated that they would dismiss their negligence and punitive damages claims without prejudice if this second motion for partial summary judgment is granted; if the motion is denied, these claims are scheduled for trial on May 11, 1992. In this motion, Amcast bility of defendant Detrex Corporation ("Detrex") in asks the court to grant summary judgment as to the lia- Count II of the complaint pursuant to 42 U.S.C. § 9607 (a)(3), as to the amount of response costs Amcast is entitled to recover under Counts I and II of the complaint, and as to Detrex's liability for Amcast's future costs in responding to the trichloroethylene ("TCE") conatamination at the Elkhart Products Corporation ("EPC") facility.

I. THE MOTION TO AMEND AND ADD A COUNTERCLAIM

As a preliminary matter, on February 7, 1992, Detrex moved for leave to amend its answer to include a counterclaim under 42 U.S.C. § 9613. Trial is scheduled to commence on May 11, and the suit has been pending for four and a half years. Leave to amend is to be freely given when justice so requires, Fed.R.Civ.P. 15(a), but determination of the requirements of justice rest within the trial court's discretion. *Campbell v. Ingersoll Milling Machine Co.*, 893 F.2d 925, 927 (7th Cir.), *cert. denied* 498 U.S. 844, 111 S.Ct. 127, 112 L.Ed.2d 95 (1990). Delay alone is not a sufficient basis for denial of a requested amendment, *Feldman v. Allegheny Int'l, Inc.*, 850 F.2d 1217, 1225 (7th Cir. 1988), but a presumption against amendment grows with delay. *Tamari v. Bache & Co. S.A.L.*, 838 F.2d 904, 908 (7th Cir.1988).

> The burden to the judicial system can justify a denial of a motion to amend "even if the amendment would cause no hardship at all to the opposing party." Because substantive amendments shortly before trial serve to defeat the public's interest in speedy resolution of legal disputes, "[a] district court judge is entitled, in such circumstances, to refuse to allow a plaintiff's amendment."

Perrian v. O'Grady, 958 F.2d 192, 194 (7th Cir.1992) (citations omitted).

The motion to amend was made three months before trial, after years of discovery and the filing of serial summary judgment motions. As is discussed below, denial of the amendment will not prejudice Detrex's right to pursue its would-be counterclaim in a separate action. Accordingly, while amendment to these pleadings would jeopardize the trial date of a suit in its fifth year of pendency, the motion's denial will prejudice nobody.

For these reasons, the court now denies the motion to amend.

II. AMCAST'S SUMMARY JUDGMENT MOTION

A. Count II

Amcast claims that it is entitled to summary judgment on Detrex's liability in Count II because the court has already found that Detrex arranged for the disposal of hazardous substances on the EPC site. In a cost recovery action under 42 U.S.C. § 9607(a)(4)(B), a private party must show that: (1) the defendant is a covered person under 42 U.S.C. § 9607(a); (2) there has been a release or threatened release of a hazardous subsmtance from the defendant's facility; (3) the plaintiffs incurred response costs as a result of the release or threatened release; and (4) the plaintiffs' response costs were necessary and consistent with the national contingency plan ("NCP"). ***Dedham Water Co. v. Cumberland Farms***

Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir.1989); *B.F. Goodrich Co. v. Murtha*, 754 F.Supp. 960, 963-64 (D. Conn.1991); *Artesian Water Co. v. Government of New Castle County*, 659 F.Supp. 1269, 1278-79 (D.Del. 1987), *affirmed*, 851 F.2d 643 (3d Cir.1988). Amcast notes that CERCLA liability is strict. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d at 1150; *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 670, n. 8 (5th Cir.1989); *Rodenbeck v. Marathon Petroleum Co.*, 742 F.Supp. 1448, 1456 (N.D.Ind.1990). The elements of a prima facie case are straightforward and several courts have found that liability may be resolved in a summary judgment motion. *United States v. Bliss*, 667 F.Supp. 1298, 1308-09 (E.D.Mo.1987).

Amcost claims that each element of a prima facie case for Detrex's liability under 42 U.S.C. § 9607(a)(3) (arranging for disposal of hazardous substances) has been established by the November 18, 1991 order. Detrex was found to have released hazardous substances into the environment, and Amcast was found to have incurred costs that were necessary and consistent with the NCP. Detrex cannot avail itself of the statutory defenses to liability: the environmental contamination did not result from an act of God, an act of war, or an act of a completely independent third party. The November 18 order found that Detrex's drivers or Detrex's contractor, Transport Services, were responsible for spills which occurred between 1978 and 1986; therefore, Detrex is a responsible party within the meaning of 42 U.S.C. § 9607(a)(3). Furthffier, Detrex "disposed" of a hazardous waste when it spilled TCE at the EPC site. Amcast contends that the law of the case establishes the remaining elements of CERCLA liability. The November 18 order determined that Amcast incurred clean-up costs that were necessary and consistent with the NCP.

Detrex responds that Amcast's motion for summary judgment on Count II goes beyond the order of Novem-

ber 25. That order allowed the plaintiffs until December 16, 1991 to file a motion as to damages, but did not allow the plaintiffs to file another motion for summary judgment on liability. Therefore, Detrex asks the court to ignore the portion of the motion which requests summary judgment as to liability under Count II.

Amcast suggests that the motion for summary judgment on Count II is made in the interest of judicial economy, as it would tie up loose ends in this litigation and allow for the presentation of a complete record on appeal. Amcast also claims that a finding of Detrex's liability under Count II would not affect Detrex's liability for damages; whether Detrex is liable under Count I or II or both, it is jointly and severally liable for Amcast's response costs.

In the alternative, Detrex asks the court to reconsider the November 18 order and grant summary judgment in Detrex's favor on Count II. However, a motion for reconsideration should not be used to relitigate matters upon which the court has ruled. *Evans, Inc. v. Tiffany & Co.*, 416 F.Supp. 224, 244 (N.D.Ill.1976). If the motion for reconsideration does not demonstrate manifest error of law or fact or present newly discovered evidence, it should be denied. *Dresser Industries, Inc. v. Pyrrhus AG*, 936 F.2d 921, 936 (7th Cir.1991). Detrex's arguments as to Count II do not demonstrate manifest error or present newly discovered evidence. Therefore, the court will not reconsider Detrex's motion for summary judgment as to Count II.

The court finds that, in light of the order of November 18, 1991, summary judgment should be granted in the plaintiffs' favor as to Count II, except as to any allegations related to an overfill spill.

B. Count I

1. Joint and Several Liability

Detrex argues that CERCLA liability may be several rather than joint and several, and that Detrex should be allowed to show either the divisibility of the harm or the degree of harm caused by Detrex. Detrex cites *United States v. Hardage,* 116 F.R.D. 460, 465-66 (W.D.Okla. 1987), in which the court stated:

> A careful review of the legislative history of CERCLA establishes Congress wished to avoid mandatory joint and several liability. The Court may impose joint and several liability where the harm is single and indivisible. However, defendants must be given the opportunity to demonstrate the divisibility of the harm and the degrees to which each defendant is responsible. This determination of liability turns on whether the harm caused . . . is "divisible" or "indivisible." The Court notes that imposition of joint and several liability is permissive, but not mandatory. Congress intended issues of liability under CERCLA, including joint and several liability, to be determined under traditional and evolving principles of federal common law. The Court may also apportion damages according to "the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous wastes," and "the degree of care exercised by the parties with respect to the hazardous waste concerned." *United States v. A & F Materials Co.,* 578 F.Supp. 1249, 1256 (S.D.Ill.1984).

(citation omitted).

Detrex suggests applying a case-by-case evaluation of the facts in order to determine whether to impose joint and several liability. *State of Idaho v. Bunker Hill Co.,* 635 F.Supp. 665, 676 (D.Idaho 1986). The Fourth Circuit applied joint and several liability in a case in which the environmental harm was indivisible among multiple

generators of hazardous wastes. However, the court stated:

> Whle CERCLA does not mandate the imposition of joint and several liabiilty, it permits it in cases of indivisible harm. In each case, the court must consider traditional and evolving principles of federal common law, which Congress has left to the courts to supply interstitally.
>
> Under common law rules, when two or more persons act independently to cause a single harm for which there is a reasonable basis of apportionment according to the contribution of each, each is held liable only for the portion of harm that he causes.

United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir.1988) (citations and footnote omitted), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989).

Detrex acknowledges that it has the burden of demonstrating that a reasonable basis for apportionment of damages exists, *United States v. Alcan Aluminum Corp.*, 755 F.Supp. 531 (N.D.N.Y.1991); *Kelly v. Thomas Solvent Co.*, 727 F.Supp. 1532, 1552 (W.D.Mich. 1989), and claims that it can do so. Detrex submits the affidavit of Mark Rowland, a groundwater hydrologist, to demonstrate that the harms caused by Detrex are distinct from those caused by other parties. There were, at one point, 783 gallons of TCE in the soil and groundwater beneath the FPC facility. Detrex claims that none of this TCE is attributable to the delivery spills for which it is held liable. Mr. Rowland believes that the TCE which spilled during deliveries did not reach the soil, but evaporated without causing harm to the soil or groundwater.

Mr. Rowland states that the maximum amount of TCE spilled during deliveries was 49.3 gallons. This constitutes a small percentage (6.296%) of the TCE

B. Count I

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found in the soil and groundwater. If Detrex is not responsile for all of the delivery spills, then it is responsible only for the 2.8 gallons of spillage from Detrex trucks, or .358% of the 783 gallons of TCE. Therefore, Detrex asserts that theer is a reasonable basis for apportionment of damages.

This case involved but one containment, unlike the multi-waste cases in which apportionment was unreasonable because of the synergistic effect of commingling contaminants. In *Kelley v. Thomas Solvent Co.*, 727 F. Supp. at 1553-54, the court found joint and several liability proper because the defendants presented no evidence demonstrating that the environmental harm was divisible. In one of the contaminated sites, a mixture of pollutants had migrated from the defendants' facilities. *See also O'Neil v. Picillo*, 682 F.Supp. 706 (D.R.I.1988), *affirmed*, 883 F.2d 176 (1st Cir.1989), *cert. denied*, 493 U.S. 1071, 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990).

Detrex distinguishes this case from *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361, 1395-96 (D.N.H. 1985), in which the hazardous waste was buried in drums throughout the site. In the case at hand, Detrex maintains, the TCE contamination resulting from delivery spils was limited to the delivery area of the FPC facility.

Detrex claims that the court can apportion liability in this case based on the quantity of TCE spilled during delivery compared to the total TCE contamination found. In *O'Neil v. Picillo*, 682 F.Supp. at 725, the court found it impossible to determine which defendant's waste contributed in a specific manner to the contamination, because different substances of differing levels of toxicity could commingle and have a synergistic effect. However, the court noted: "There is no question that the number of drums may be an appropriate criterion for apportioning liability if all of the drums contained identical wastes." *See also United States v. Monsanto Co.*, 858 F.2d at 172, n. 27.

For these reasons, Detrex asks the court to conduct a trial to allow it to establish the negligible amount of damages arising from its "several" liability.

Amcast cites *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir.1989), *cert. denied*, 494 U.S. 1057, 110 S.Ct. 1527, 108 L.Ed.2d 767 (1990), in which the court noted that the responsible parties bear the burden of proving the divisibility of harm, and that "CERCLA has been interpreted to impose joint and several liability when the environmental harm is indivisible . . . and to allow for apportionment when two or more persons independently are responsible for a single harm that is divisible." 889 F.2d at 1507 (citing *United States v. Monsanto Co.*, 858 F.2d 160, 171-73 (4th Cir.1988)). The court went on to state that CERCLA permits actions for contribution among parties who are found jointly and severally liable. 889 F.2d at 1507. Amcast claims that although imposing joint and several liability may result in some defendants paying more than their share of the harm, it would further Congressional intent for "those proven at least partially culpable to bear the cost of the uncertainty." *O'Neil v. Picillo*, 883 F.2d at 179.

Amcast notes that the volume of TCE alone is an insufficient basis upon which to find the harm divisible, citing *United States v. Monsanto*, 858 F.2d at 172-73. However, more than one containment was found to have caused environmental harm in the *Monsanto* case:

> Common sense counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others improperly mixed could result in disastrous consequences. Under other circumstances proportionate volumes of hazardous substances may well be probative of contributory harm. In this case, however, volume could not establish the effective con-

> tribution of each waste generator to the harm at the . . . site.

858 F.2d at 172-173 (footnotes omitted).

Amcast also submits the affidavit of its expert witness, John Mundell, to show that volume alone is an insufficient basis to divide the harm. Mr. Mundell states that the environmental harm is indivisible because "distinct areas indicating separate, spill events are not apparent." Further, the soil and groundwater diffuse chemical spills from the source point, making it impossible to determine whether response costs can be attributed to a particular spill.

Amcast claims that to avoid joint and several liability, Detrex must demonstrate a reasonable basis for apportionment in addition to demonstrating the divisibility of the harm. In *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.Supp. 984 (D.S.C.1984), *affirmed in part and vacated in part, United States v. Monsanto*, 858 F.2d 160 (4th Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989), the district court determined that the apportionment of costs of responding to environmental harm could not be based solely on the volume of wastes each party generated. In that case, however, unlike the case at hand, there were several types of hazardous wastes that were laking from containers and commingling, so it was impossible to ascertain the degree of harm caused by each generator.

Although only one contaminant is involved in this action, unlike those cases in which the court expressed concern over commingling of contaminants, the court is not convinced that the harm caused at the EPC site is readily divisible or that there is a reasonable basis for apportionment. In light of Mr. Mundell's affidavit, it appears that the TCE contamination caused by Detrex is not limited to a single area; the earlier summary judg-

ment holdings concerning the "open valve" spill support that conclusion. Further, the TCE spilled during deliveries was less resistent to mobilization through the soil than stillbottoms created during EPC's processing and spilled by EPC employees. The TCE delivered by Detrex was also more concentrated than the TCE in stillbottoms. Therefore, the amount spilled by EPC employees, compared to the amount spilled by Detrex employees, even if it can be determined, may not be a reasonable basis for apportionment of response costs.

In the usual case, equitable apportionment of damages comes into play in a contribution action or claim pursuant to 42 U.S.C. § 9613 after joint and several liability is imposed in a cost recovery action pursuant to 42 U.S.C. § 9607. Detrex asserts, however, that in some CERCLA cases between private parties who are potentially responsible for response costs, it is appropriate to try liability and apportion damages in the same action.

Detrex claims that it would overlook Congressional intent to require it to reimburse Amcast for one hundred percent of its costs. Congress did not intend for minor contributors to fund the entire cleanup of a hazardous waste cite. *United States v. A & F Materials Co., Inc.*, 578 F.Supp. 1249, 1256 (S.D.Ill.1984). *See also O'Neil v. Picillo*, 682 F.Supp. at 725-26.

Detrex notes that in *Amoco Oil Co. v. Borden*, 889 F.2d at 672, the court recognized that in a cost recovery suit between private parties, "the action is one for contribution, which is specifically recognized under CERCLA. *See* § 9613(f). Under that provision, a court has considerable latitude in determining each party's equitable share." In that case, however, the court concluded that the environmental harm was indivisible and that the plaintiff/owner of the property shared joint and several liability with the defendant/vendor of the property.

In *Shapiro v. Alexanderson*, 741 F.Supp. 472-478-79 (S.D.N.Y.1990), the court determined that the plaintiff

who was responsible for environmental harm could recover contribution from other parties for response costs based on their degree of responsibility. The *Shapiro* court did not suggest, however, that the plaintiff's right to recover in the § 9607 action should be delayed while the parties litigated the degree of culpability of each party. In *Environmental Transportation Systems, Inc. v. Ensco, Inc.*, 763 F.Supp. 384 (C.D.Ill.1991), the court stated:

> Section 9613(f)(1) of CERCLA states that, "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." Thus, it is apparent that a finding that a defendant is a "responsible party" under § 9607(a), as this Court decided ENSCO was . . . is only the initial inquiry. Finding that a defendant is a responsible party and thus strictly liable for contribution under § 9607(a) does not mean that all parties are equally responsible and should share costs on a pro rata basis. Rather, such a finding means only that a defendant is *potentially* liable for contribution under CERCLA depending upon the relative fault of the parties. Once a defendant is found to be a responsible party under § 9607(a), the question shifts to *how much* is that defendant responsible for under the provisions in § 9613(f)(1). Thus, ETS's request for pro rata assessment is rejected as patently inconsistent with the dictates of CERCLA.
>
> Section 9613 contemplates a court's assessing the relative culpability of each responsible party in determining the proportionate share of costs each must bear." *United States v. Monsanto Co.*, 858 F.2d 160, 170 n. 29 (4th Cir.1988).

Environmental Transportation Systems, Inc. v. Ensco, Inc., 763 F.Supp. at 388 (emphasis in original). Detrex contends that the court should allocate fault in this action without Detrex having to bring a separate contribu-

tion action pursuant to § 9613. Amcast claims that equitable apportionment is only applicable in suits for contribution brought pursuant to 42 U.S.C. § 9613(f), and not in this action, noting that Detrex did not assert a contribution claim. Detrex initially denied all liability. Amcast suggests that Detrex should have to abide by the decision it made earlier in this aciton not to bring a contribution claim.

Amcast cites *United States v. Pretty Products, Inc.*, 780 F.Supp. 1488, 1503 (S.D.Ohio1991) ("Comparative fault has no place in a 9607 suit, although it certainly may be relevant in a suit for contribution under 9613."). In *O'Neil v. Picillo*, 682 F.Supp. at 725-26, the court determined that apportionment should await an action for contribution.

> I am not insensitive to the possible unfairness involved in holding a few relatively small contributors jointly and severally liable for the entire harm. Indeed there is no question that in CERCLA actions, like other actions involving joint tortfeasors, a court may consider equitable factors to apportion damages and mitigate the effects of joint and several liability. I believe, however, that issues of fairness and equitable apportionment may be more properly addressed in a subsequent contribution action. . . .
>
> This is consistent with CERCLA's key objective of "facilitat[ing] the prompt cleanup of hazardous dumpsites by providing a means of financing both governmental and private responses, and by placing the ultimate financial burden upon those responsible for the danger." *City of Philadelphia v. Stepan Chemical Co.*, 544 F.Supp. 1135, 1142-43 (E.D.Pa. 1982). By delaying thorny considerations of equitable apportionment to a later contribution proceeding, the government is provided immediate funds after the initial liability hearing to take prompt remedial action at the earliest opportunity. In most

> instances, immediate response to potential disasters caused by seepage and migration can forestall the accrual of considerably higher compensation costs.

(citations omitted). *See also United States v. Stringfellow*, 661 F.Supp. 1053, 1060 (C.D.Cal.1987).

In *United States v. Kramer*, 757 F.Supp. 397, 412 (D.N.J.1991), the court noted that a contribution claim may be brought during the pendency of a cost recovery action under 42 U.S.C. § 9607. The court allowed the plaintiff, in that case the federal government, to recover its responses costs, regardless of its own potential liability for contribution. *United States v. Kramer*, 757 F.Supp. at 414. The court further reasoned that § 9607 and § 9613 have different purposes.

> Collapsing the distinction between section 107 [42 U.S.C. § 9607] and section 113 [42 U.S.C. § 9613] ignores the clear language and structure of the statute. Section 107 imposes liability "[n]otwithstanding any other provision or rule of law and subject only to" the defenses set forth in seciton 107(b). Congress enacted section 113 as a separate section to address contribution.
>
> [I]t would be "anomalous" to permit apportionment of clean-up costs among PRPs in a section 113 action and not to permit apportionment in a section 107 action, but *only if* defendants in a section 107 action could not seek contribution in a section 113 action. But the structure of CERCLA does not preclude consideration of equitable factors, including the liability of a PRP who was (or is) plaintiff in a section 107 action. Rather, CERCLA separates those equitable factors from section 107 and considers them in a section 113 contribution action. . . .
>
> . . . CERCLA was enacted to facilitate cleanup of the tens of thousands of hazardous waste sites in this country. Section 107 permits the Government

> or a private party to go in, clean up the mess, pay the bill, then collect *all* its costs not inconsistent with the NCP from other responsible parties—even if plaintiff was also responsible for the contamination. Any PRP is entitled under section 113 to bring a contribution action against other PRPs—including the PRP who previously cleaned up the mess and was paid for its trouble through a section 107 proceeding—to apportion costs equitably among all the PRPs. Practically speaking, section 107 permits a PRP, including the Government, to collect all its response costs, even those that that same PRP may be required to pay back to other PRP's as its equitable share in a section 113 proceeding.
>
> What might be called a windfall for a plaintiff PRP in a section 107 action serves as an incentive for private parties to clean up hazardous waste sites, to risk their own capital initially, knowing that by then prevailing in a section 107 action, they will be reimbursed perhaps in excess of what might be shown in a section 113 action to have been their equitable share. If the courts collapse the distinction between a section 107 and 113 proceeding, there will be less incentive for private parties to initiate cleanup, since they would lose the use of that *temporary* windfall gained in a section 107 action.

United States v. Kramer, 757 F.Supp. at 416-17 (emphasis in original) (footnote omitted).

Many of the cases upon which Detrex relies analyzed contribution claims under § 9613, *e.g.*, *Amoco Oil v. Borden*, 889 F.2d at 672; *Shapiro v. Alexanderson*, 741 F.Supp. at 479, n. 5. In *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir.1991), the court applied § 9613 to apportion liability in a § 9607 action, but relied in part on the fact that the party seeking response costs had admitted CERCLA liability. Amcast has made no such

admission. Further, the *Dant & Russell* court apportioned liability within the context of a proof of claim in a bankruptcy case.

Detrex cites *FMC Corp. v. Northern Pump Co.*, 668 F.Supp. 1285 (D.Minn.1987), in which the plaintiff brought a § 9607 claim and there was no § 9613 counterclaim. In that case, the district court determined that one of the potentially responsible persons was not liable. The court noted that two factors were necessary to impose liability for response costs: CERCLA liability and accountability for disposal of hazardous wastes. The court found that one party was potentially liable under CERCLA, but it was not accountable for disposal of hazardous wastes. The court's decision was based in part on the fact that the party had been released from liability by agreement, and that the party had not disposed of hazardous wastes at the site. *FMC Corp. v. Northern Pump Co.*, 668 F.Supp. at 1290-91. In this case, Detrex has not been released from liability, and Detrex was found to have released TCE at the EPC site.

The court finds the reasoning of *United States v. Kramer*, 757 F.Supp. 397, persuasive. CERCLA's intent is better realized when the apportionment of liability takes place in a claim under § 9613. Section 9607 does not provide for apportionment of liability, and has only a limited number of defenses that do not apply to this action. Therefore, the court concludes that it should not engage in equitable apportionment of the parties' liability in this case. Apportionment will have to await Detrex's filing of an action under § 9613.

Detrex argues that Amcast's earlier settlement with former shareholder defendants should be considered in this court's apportionment. The plaintiffs in this action received $1 million from the former shareholder defendants. In *Comerica Bank-Detroit v. Allen Industries, Inc.*, 769 F.Supp. 1408 (E.D.Mich.1991), the court applied

comparative fault to a CERCLA action settlement. Under § 6 of the Uniform Comparative Fault Act, the plaintiffs' recovery against the non-settling defendants is reduced by the settling defendants' equitable share of fault. Therefore, Detrex claims, before assigning a percentage of fault against Detrex, the court should determine the fault of Detrex, the plaintiffs, and the former shareholders. Detrex has submitted a considerable amount of evidence in this motion and in its previous motion for summary judgment, indicating that the Elkhart Products Corporation employees were responsible for some of the TCE contamination. Many of the areas where contamination occurred were separate from the delivery area, where Detrex's spills occurred.

For the reasons stated above, the court will not apportion liability in this case. Even if apportionment were applied against Amcast, the court would not apportion the liability of the former shareholder defendants, as the order of November 14, 1990 determined that the former shareholders were not liable. The plaintiffs are entitled to recover their response costs from Detrex.

2. Additional Costs

Amcast claims that it is entitled to recover all of its response costs, including its attorney fees, against Detrex in light of the court's finding of liability on Count I. As of November 22, 1991, Amcast had incurred $1,197,082.42 in costs which it now seeks to recover. CERCLA provides that private parties may recover "any . . . necessary costs of response incurred . . . consistent with the national contingency plan." 42 U.S.C. § 9607 (a)(4)(B). Amcast claims that its response costs include expenses incurred in storage, confinement, treatment, transport, and disposal of hazardous waste, and monitoring the effectiveness of the response. *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1154 (9th Cir.1989), discusses the scope of the term "response cost".

> CERCLA does not define the term "response cost." However, in its definitional section, CERCLA does define "response" as "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25). These four terms are defined in the two immediately preceding subsections, §§ 9601(23) & (24). Section 9601(23) makes clear that "removal" includes "the cleanup . . . of released hazardous substances from the environment."

(citation omitted). Amcast's response costs include the cost of investigating the release of a hazardous substance, as well as evaluating and producing methods to address the release. 42 U.S.C. §§ 9601(23), (24); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir.1988); *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 840 F.2d 691, 695 (9th Cir.1988).

a. Indirect Costs

Amcast also contends that in addition to recovering the costs directly related to addressing the TCE contamination, it is entitled to recover such indirect costs as labor expenses and office supplies attributable to its response action. Of the $1,197,082.42 of costs incurred as of November 22, 1991, $55,992.28 constituted indirect employee labor costs.

In *T & E Industries, Inc. v. Safety Light Corp.*, 680 F.Supp. 696, 706-07 (D.N.J.1988), the court found that recoverable costs under 42 U.S.C. § 9601(23) encompassed the value of the time the company president spent in evaluating and mitigating the contamination problem. *See also United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir.1989), *cert. denied*, 494 U.S. 1057, 110 S.Ct. 1527, 108 L.Ed.2d 767 (1990); *and United States v. Hardage*, 733 F.Supp. 1424, 1437 (W.D.Okla.1989) (the government was entitled to recover its indirect response costs).

Detrex contends that employee labor is not a response cost recoverable in a CERCLA action, citing *Artesian Water Co. v. Government of New Castle County,* 659 F.Supp. 1269, 1285-96 (D.Del.1987), *aff'd,* 851 F.2d 643 (3rd Cir.1988), which noted that Congress chose not to provide recovery for income loss. Detrex also cites *In re Hemingway Transport, Inc.,* 126 B.R. 656, 663 (D.Mass.1991), *aff'd,* 954 F.2d 1 (1st Cir.1992), which stated that CERCLA does not provide recovery for employee time spent in cleanup efforts. The court agrees with Amcast that the indirect costs of employee labor and overhead expenses are recoverable, as such costs are "part and parcel of all costs of the removal action, which are recoverable under CERCLA." *United States v. R.W. Meyer, Inc.,* 889 F.2d at 1503.

b. Attorney Fees

Amcast seeks its attorney fees incurred in connection with its response actions and this cost recovery suit, citing 42 U.S.C. § 9601(25), which states that "[t]he terms 'respond' or 'response' means [sic] remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." In *Pease & Curren Refining, Inc. v. Spectrolab, Inc.,* 744 F.Supp. 945, 951 (C.D.Cal.1990), and in *General Electric Co. v. Litton Business Systems, Inc.,* 715 F.Supp. 949, 959 (W.D. Mo.1989), *aff'd,* 920 F.2d 1415 (8th Cir.1990), *cert. denied,* —— U.S. ——, 111 S.Ct. 1390, 113 L.Ed.2d 446 (1991), the courts determined that attorney fees were recoverable response costs.

Detrex claims that attorney fees are not recoverable response costs. Case law is inconsistent. Several cases have denied attorney fees in private CERCLA actions. *State of New York v. SCA Services, Inc.,* 754 F.Supp. 995, 1000 (S.D.N.Y.1991), stated that the pervailing rule is that attorneys fees are not recoverable in private CERCLA actions and that if Congress had intended to

allow recovery of attorney fees it would have so provided. *See also Mesiti v. Microdot, Inc.*, 739 F.Supp. 57, 62 (D.N.H.1990); *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D.R.I.1989).

In *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F.Supp. at 950-51, the court concluded that allowing attorney fees as recoverable response costs would further CERCLA's intent to provide prompt and effective cleanup of waste disposal sites and insure that those responsible for the release of hazardous substances bore the cost of response, citing *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir.1986). *See also General Electric Co. v. Litton Industrial Automation Systems*, 920 F.2d at 1422. In allowing recovery of attorney fees and litigation expenses in a cost recovery action, the court in *Bolin v. Cessna Aircraft Co.*, 759 F.Supp. 692, 710 (D.Kan.1991), stated:

> By providing private remedies with a federal cause of action for the recovery of necessary expenses in the cleanup of hazardous wastes, Congress intended § 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action. . . . The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs. Thus, to the extent that any litigation costs incurred by the plaintiffs fall within the meaning of the "necessary costs" authorized under § 9607(a)(4)(B), plaintiffs are entitled to recover such costs.

See also Key Tronic Corp. v. United States, 766 F.Supp. 865, 871-72 (E.D.Wash.1991). This court finds the *Bolin* court's position persuasive and well-taken. It would defeat the express purpose of CERCLA to require plaintiffs seeking to recovery response costs to incur attorney fees in connection with their actions to recover response

costs. Enforceemnt activities recoverable under § 9607 necessarily include attorney fees, and, therefore, Amcast may recover its attorney fees in this action.

c. Declaratory Relief

Amcast requests a declaratory judgment pursuant to 42 U.S.C. § 9613(g)(2) that Detrex is liable for any future costs it incurs in cleaning up the TCE contamination, claiming that such a judgment is appropriate as to future costs because the court cannot award costs until they are incurred. *United States v. Hardage*, 733 F. Supp. at 1439; *Williams v. Allied Automotive Autolite Division*, 704 F.Supp. 782, 784 (N.D.Ohio 1988); *Rockwell International Corp. v. I U International Corp.*, 702 F.Supp. 1384, 1388 (N.D.Ill.1988).

Detrex claims that Amcast is not entitled to declaratory relief as to the plaintiffs' future response costs because a trial is necessary to determine each party's liability. CERCLA provides for a declaratory judgment on liability for response costs in § 9607 actions. 42 U.S.C. § 9613(g)(2). In *In re Dant & Russell, Inc.*, 951 F.2d at 249-50, the court explained the propriety of declaratory relief as to future response costs in a CERCLA action:

> [Sections 9607 and 9613(g)(2)] envision that, before suing, CERCLA plaintiffs will spend money responding to an environmental hazard. They can then go to court and obtain reimbursement for their initial outlays, as well as a declaration that the responsible party will have continuing liability for the cost of finishing the job.
>
> This system strikes a balance between a number of consideration. By requiring a plaintiff to take some positive action before coming to court, CERCLA insures that the dispute will be ripe for judicial review. On the other hand, by not requiring plaintiffs to perform full cleanup before coming to

> court, and by expressly providing for declaratory judgments, CERCLA substantially reduces the risk involved in performing the cleanup. This encourages private response.

(citation omitted). *See also United States v. Kramer,* 757 F.Supp. at 412.

The court agrees, and concludes that the plaintiffs are entitled to a declaratory judgment as to their future response costs.

III. CONCLUSION

For the foregoing reasons, the court hereby DENIES the defendants' motion to amend, and GRANTS the plaintiffs' motion for partial summary judgment. In light of the plaintiffs' representation that they will dismiss their common law negligence claim in Count VI and their claim for punitive damages, it appears that no issues remain in this case, and the clerk is directed to enter judgment in accordance with this order and the order of November 18, 1991.

Judgment shall be entered for the plaintiffs on Counts I, II, IV, V, VII, VIII, IX, and XIII of the plaintiffs' complaint in the amount of $1,197,082.42 as response costs incurred as of November 22, 1991, thus attorneys fees, litigation expenses and prejudgment interest in sums to be determined hereafter pursuant to District Rule 43. Interest shall accrue on the amount of the judgment as allowed by law. Declaratory judgment shall be entered for the plaintiffs as to defendant Detrex's liability for all future response costs incurred by plaintiffs in responding to the TCE contamination at plaintiff Elkhart Products' plant in Elkhart, Indiana. The future response costs for which defendant Detrex and its successors or assigns are liable include attorneys fees, litigation and expenses and prejudgment interest.

SO ORDERED.

UNITED STATES DISTRICT COURT
N.D. INDIANA
SOUTH BEND DIVISION

No. S88-620 (RLM)

AMCAST INDUSTRIAL CORPORATION, *et al.*,
Plaintiffs,

v.

DETREX CORPORATION, *et al.*,
Defendants.

Nov. 18, 1991

MEMORANDUM AND ORDER

MILLER, District Judge.

This is a CERCLA case in which the plaintiff seeks to recover response costs against a supplier of a hazardous substance, whose drivers are claimed to have spilled the substance during deliveries. The cause comes before the court on the motion by defendant Detrex Corporation's for summary judgment, the plaintiffs' motion for partial summary judgment, and Detrex's first and second motions to strike portions of the documentary evidence submitted in support of the plaintiffs' partial summary judgment motion. The parties' briefing, arguments as positive arguments of their own, began on August 19 and appears to have come to a close on November 8.

The court acknowledges the plaintiffs' request for oral argument on their motion for partial summary judgment and on the first motion to strike. However, the parties'

thorough memoranda sufficiently aid the court that oral argument will not be necessary, particularly in recognition of the proximity of the December 2 trial date.

I. FACTS

Plaintiff Elkhart Products Corporation ("EPC") operates a manufacturing plant in Elkhart, Indiana. EPC is a wholly owned subsidiary of plaintiff Amcast Industrial Corporation ("Amcast"). Detrex manufactures chemicals for industrial uses, including a solvent known as trichloroethylene ("TCE"), a hazardous substance as defined in 42 U.S.C. § 9601(14). TCE is a mutagen and a suspected carcinogen, and human exposure to this substance may cause eye and skin irritation, headaches, heart disease, and liver damage.

Detrex marketed its chemicals to Indiana customers through its Gold Shield Solvents Division in Indianapolis. Detrex sold TCE to EPC between 1978 and 1986, making approximately thirty-four deliveries to the Elkhart site. Detrex was EPC's sole supplier of TCE during those years. Detrex employed five drivers to deliver the solvent. However, for fifteen of the thirty-four deliveries, Detrex used the services of an independent common carrier, Transport Services Company ("Transport").

The plaintiffs contend that TCE was spilled when it was delivered by Detrex or Transport drivers, contaminating the soil and groundwater. The plaintiffs assert that the drivers spilled two to five gallons of TCE with each delivery, and twice spilled greater quantities. One occasion involved an overfilling of EPC's tank, resulting in a 200 to 300 gallon spill that destroyed the asphalt pavement surrounding the tank. The other incident involved the driver's failure to close the valve of his truck, causing a two inch stream of TCE to be discharged from the truck as it left the EPC site.

EPC learned of the TCE groundwater contamination in the 1980's, following an investigation of a complaint

that TCE was travelling from the groundwater beneath EPC's plant and polluting the groundwater beneath Miles Laboratories, a pharmaceutical manufacturer located across the street.

The plaintiffs further allege that they expended more than $1 million to monitor the release of TCE into the environment, take short term action to eliminate risks, and design and install a permanent remedy. EPC claimed that its remedial action will cost nearly $1.5 million and that it sustained $1 million in property damage.

In a letter dated August 27, 1986, EPC's president demanded that Detrex reimburse EPC for the cost of the remedial measures. Detrex did not reimburse EPC. Amcast and EPC brought this action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. §§ 9601 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201. The plaintiffs also sought common law tort and contractual remedies.

II. SUMMARY JUDGMENT STANDARD

A party seeking summary judgment must demonstrate that no genuine issue of fact exists for trial and that the movant is entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c); *Certain Underwriters of Lloyd's v. General Accident Ins. Co. of America*, 909 F.2d 228, 231 (7th Cir.1990). If that showing is made and the motion's opponent would bear the burden at trial on the matter that forms the basis of the evidence to show what facts are in actual dispute. *Lujan v. National Wildlife Federation*, —— U.S. ——, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695 (1990); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Sims v. Mulcahy*, 902 F.2d 524, 540 (7th Cir.), *cert. denied* —— U.S. ——, 111 S.Ct. 249, 112 L.Ed.2d 207 (1990). If he fails to do so, summary judgment is proper. *Fitzpatrick v. Catholic Bishop of Chicago*, 916

F.2d 1254, 1256 (7th Cir.1990); *Tatalovich v. City of Superior,* 904 F.2d 1135, 1142 (7th Cir.1990). A genuine factual issue exists only when there is sufficient evidence for a jury to return a verdict for the motion's opponent. *Harbor House Condominium Ass'n v. Massachusetts Bay Ins. Co.,* 915 F.2d 316, 320 (7th Cir. 1990); *Hines v. British Steel Corp.,* 907 F.2d 726, 728 (7th Cir.1990). Summary judgment should be granted if no reasonable jury could return a verdict for the motion's opponent. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Visser v. Packer Engineering Associates, Inc.,* 924 F.2d 655, 660 (7th Cir.1991).

The parties cannot rest on mere allegations in the pleadings, *Hughes v. Joliet Correctional Center,* 931 F.2d 425, 428 (7th Cir.1991); *McCarthy v. Kemper Life Ins. Companies,* 924 F.2d 683, 687 (7th Cir.1991), or upon conclusory allegations in affidavits. *Mestayer v. Wisconsin Physicians Service Ins. Corp.,* 905 F.2d 1077, 1079 (7th Cir.1990). The court must construe the facts as favorably to the non-moving party as the record will permit, *Brennan v. Daley,* 929 F.2d 346, 348 (7th Cir. 1991); *Soldal v. County of Cook,* 923 F.2d 1241, 1245 (7th Cir.1991), and draw any permissible inferences from the materials before it in favor of the non-moving party, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Illinois Bell Telephone Co. v. Haines and Co., Inc.,* 905 F.2d 1081, 1087 (7th Cir.1990), as long as the inferences are reasonable. *Bank Leumi Le-Israel, B.M. v. Lee,* 928 F.2d 232, 236 (7th Cir.1991). The non-moving party must show that the disputed fact is immaterial, or outcome-determinative, under applicable law. *Johnson v. Pelker,* 891 F.2d 136, 138 (7th Cir. 1989).

The court will address the parties' motions for summary judgment with these standards in mind.

III. THE MOTIONS TO STRIKE

The plaintiffs and Detrex each seek summary judgment on count I, which alleges that Detrex and its drivers are strictly liable for the plaintiff's response costs under 42 U.S.C. § 9607(a)(1) because Detrex is the owner or operator of a facility from which there was a release of hazardous substances. Detrex also moves for summary judgment in its favor as to Count II, IV, V, VI, VII, VIII, IX, and XIII and the request for punitive damages in the complaint. Count II alleges that Detrex is strictly liable under 42 U.S.C. § 9607(a)(3) for response costs because Detrex arranged for the disposal of a hazardous substance which caused contamination at the site.

Count IV of the complaint alleges that an implied term existed in the contract between Detrex and the plaintiffs that required Detrex to deliver TCE without spillage and without causing environmental damage; the plaintiffs claim that Detrex breached this implied term. Count V asserts that Detrex committed a trespass when it spilled TCE at the site. Count VI alleges negligence by the drivers who delivered TCE, and Count VII alleges that Detrex negligently hired and trained its delivery drivers. Count VIII asserts Detrex is strictly liable for damages because its delivery of TCE constituted an "abnormally dangerous activity."[1] Count IX asserted a nuisance claim and Count XIII asserted an indemnity claim, but the plaintiffs have withdrawn those counts of the complaint.

A. Evidence of the Spills

The proposition that Detrex caused TCE to be spilled is common to each of the counts. If there were no spills, Detrex engaged in no "release" (Count I), engaged in no "disposal" (Count II), breached no implied "anti-spillage"

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[1] The plaintiffs claimed in Count VIII that Detrex was engaged in an "ultrahazardous activity". However, the parties now agree that the modern term is "abnormally dangerous activity".

provision in the contract (Count IV), did not exceed the scope of its invitation so as to commit a trespass (Count V), and engaged in no abnormally dangerous activity (Count VIII). If there were no spills, the plaintiff suffered no damages due to the negligence of Detrex's drivers (Count VI) or Detrex's negligence in training or retraining those drivers (Count VII). Detrex argues that the plaintiffs have no admissible evidence to prove any TCE spillage by Detrex, and has moved to strike several portions of depositions that the plaintiffs seek to use as proof.

Detrex argues that the court must exclude, on hearsay grounds, *see* Fed.R.Ev. 802, the portions of the testimony of Clifton Cartwright, Henry Copenhaver, Gary Emerson, John Graber, Ed Hosea, Richard Mann, Robert Patterson, Dennis Selner, David Smith, and Robert Todd in which the deponents relate that they heard about TCE spills from others. Detrex cites *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 659 (7th Cir.1991), in which the Seventh Circuit noted that affidavits offered in opposition to a summary judgment motion were not based on personal knowledge. The court stated that Fed.R.Civ.P. 56(e) incorporates Fed.R.Ev. 602, and that evidence offered on summary judgment must be based on the affiant's or deponent's observation or other first-hand experience. 924 F.2d at 659. *See also Price v. Rochford*, 947 F.2d 829, 833 (7th Cir. 1991) ("The court believed the articles to be inadmissible. . . . If so, they fail to meet the requirements of Rule 56(e)").

The plaintiffs respond that the court should give some leeway as to evidence submitted at the summary judgment stage because of the preliminary nature of the proceeding, citing *McFeely v. United States*, 700 F.Supp. 414, 418, n. 1 (S.D.Ind.1988); and *Reed v. Ford Motor Co.*, 679 F.Supp. 873 (S.D.Ind.1988). Although each of those cases contain the broad language on which the

plaintiffs rely, 700 F.Supp. at 418 n. 1 ("Some leeway is given at summary judgment because of the preliminary nature of the proceedings"); 679 F.Supp. at 875 ("the court will not exceed evidence at this stage on grounds of hearsay, irrelevance, or undue prejudice"), the cases' holdings do not support an overly broad reading of Fed. R.Civ.P. 56(e).

The *McFeely* court, which appears to have raised the issue *sua sponte*, considered deposition testimony under Fed.R.Ev. 804(b)(1) despite the absence of a showing of the deponent's unavailability, but described its decision as "generous", and noted that, "Hearsay evidence that does not qualify under any of the hearsay exceptions may not be considered by the courts in ruling on a motion for summary judgment." 700 F.Supp. at 417-18. The *Reed* court considered unauthenticated documents attached to an attorney's affidavit, with the understanding that the documents would be the subjects of trial stipulations. These cases deal with unique circumstances. Together, they support the proposition that doubts as to admissibility should be resolved in favor of admissibility at the summary judgment stage, but they do not support a proposition that a summary judgment court may entirely disregard evidentiary rules governing admissibility at trial.

Accordingly, the court turns to the deposition portions that Detrex challenges. By way of introduction, the plaintiffs contend that the spills fall into three categories:

—*the delivery spills:* small quantities of a gallon or more routinely spilled during all or most deliveries of TCE;

—*the overfill spill:* an incident in which a storage tank was overfilled, causing 200 to 300 gallons of TCE to spill and destroy asphalt; and

—*the open-value spill:* an incident in which a truck left the storage tank with the truck's valve open, spilling twenty-five to fifty gallons of TCE.

1. Clifton Cartwright

Mr. Cartwright is EPC's plant engineer. In his deposition, he testified that Gary Emerson and Bobb Todd told him of each of the spillage incidents, although Bob Todd had learned of the overflow spill from another person. Mr. Cartwright investigated the spills, talking to everybody he could think of. Detrex argues that since Mr. Cartwright knows no more than what he was told, his deposition tesitmony is inadmissible. Fed.R.Ev. 602, 802.

The plaintiffs respond with several arguments. First, they argue that the Cartwright testimony is not hearsay because it is not offered to prove the truth of the matter asserted. Mr. Cartwright's testimony as to the purpose of his investigation following a spill that damaged the asphalt, the plaintiffs contend, is offered to prove that the plaintiffs conducted an investigation pursuant to 40 C.F.R. § 300.71(a)(2)(ii)(A) (1988), an essential element of the plaintiffs' claim in Count I. They also seem to argue that Mr. Cartwright's testimony is admissible under Fed. R.Ev. 803(24). They argue that his testimony is material and probative, and that its trustworthiness is not seriously contested.

The court agrees that Mr. Cartwright's testimony, if limited to showing the conduct of the investigation, is not hearsay. See Fed.R.Ev. 801(c); *United States v. Blandina,* 895 F.2d 293, 300-301 (7th Cir.1989). If so limited, his deposition testimony is not proof of any spill. Spills may be proven only if the residual exception established by Rule 803(24) applies.[2]

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[2] Fed.R.Ev. 803(24) provides:

A statement not specifically covered by any of the [other] exceptions [to the hearsay rule] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for

Admissibility under the residual exception established by Rule 803(24) requires that "the statement must be sufficiently trustworthy, material, probative, in the interests of justice, and given to opposing parties with the proper notice." *F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d 564, 576 (7th Cir.), *cert. denied*, 493 U.S. 954, 110 S.Ct. 366, 107 L.Ed.2d 352 (1989). At this point, the court affords the plaintiffs the leeway discussed in *McFeely* and *Reed:* the record contains no suggestion that Detrex was given notice that the plaintiffs intended reliance on Rule 803(24), *see United States v. Wilkus*, 875 F.2d 649, 655 (7th Cir.), *cert. denied*, 493 U.S. 865, 110 S.Ct. 184, 107 L.Ed.2d 139 (1989), but at the summary judgment stage, the court will consider the statements' admissibility under the remaining tests.

District courts have considerable discretion in applying the residual exception. *United States v. Mokol*, 939 F.2d 436, 438 (7th Cir.1991); *United States v. Doerr*, 886 F.2d 944, 954 (7th Cir.1989); *United States v. York*, 852 F.2d 221, 224 (7th Cir.1988); *United States v. Howard*, 774 F.2d 838, 845 (7th Cir.1985). The residual exception is "intended to be used rarely, and only in exceptional circumstances." *United States v. Moore*, 791 F.2d 566, 573 (7th Cir.1986); *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir.1979).

Among the factors considered in determining whether to apply the residual exception are the declarant's disinterest, *United States v. Jackson*, 780 F.2d 1305, 1316 (7th Cir.1986); *United States v. Howard*, 774 F.2d at 845, the declarant's motivation to lie, *United States v. York*, 852 F.2d at 225, whether the statement was made under oath, *United States v. Hooks*, 848 F.2d 785, 797 (7th Cir.1988); *United States v. Guinan*, 836 F.2d 350,

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which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

355 (7th Cir.), *cert. denied,* 487 U.S. 1218, 108 S.Ct. 2871, 101 L.Ed.2d 907 (1988); *United States v. Boulahanis,* 677 F.2d 586, 588 (7th Cir.), *cert. denied,* 459 U.S. 1016, 103 S.Ct. 375, 74 L.Ed.2d 509 (1982), the declarant's probable motivation in making the statement, *United States v. Marshall,* 856 F.2d 896, 901-902 (7th Cir.1988); *United States v. Guinan,* 836 F.2d at 355; *Cook v. Hoppin,* 783 F.2d 684, 691 (7th Cir. 1986), the extent of the declarant's personal knowledge of the events recounted in the statement, *United States v. Doerr,* 886 F.2d at 956; *F.T.C. v. Amy Travel Service, Inc.,* 875 F.2d at 576; *United States v. Snyder,* 872 F.2d 1351, 1356 (7th Cir.1989), the probable accuracy of the witness's recounting of the declarant's statement, *United States v. Hooks,* 848 F.2d at 797, a testifying witness's knowledge of the statement's contents, *United States v. Peters,* 791 F.2d 1270, 1293 (7th Cir.), *cert. denied sub nom, Odoner v. United States,* 479 U.S. 847, 107 S.Ct. 168, 93 L.Ed.2d 106 (1986), the declarant's age, *United States v. York,* 852 F.2d at 225, the declarant's character for truthfulness and honesty, *United States v. Snyder,* 872 F.2d at 1355, the frequency with which the declarant made similar statements, *United States v. Vretta,* 790 F.2d 651, 659 (7th Cir.), *cert. denied,* 479 U.S. 851, 107 S.Ct. 179, 93 L.Ed.2d 115 (1986); *United States v. Howard,* 774 F.2d at 846, whether the declarant recanted the statement, *United States v. Moore,* 936 F.2d 1508, 1517 (7th Cir.1991), the statement's temporal proximity to the event related, *United States v. Vretta,* 790 F.2d at 659, and the existence of sufficient corroborative evidence, *United States v. York,* 852 F.2d at 225; *accord, United States v. Mokol,* 939 F.2d at 440 ("where the testimony is critical to the case, the trial court may require a high degree of corroboration").

The court also must consider whether more probative, admissible evidence exists, *United States v. Powell,* 894 F.2d 895, 901 n. 5 (7th Cir.) *cert. denied,* —— U.S. ——, 110 S.Ct. 2189, 109 L.Ed.2d 517 (1990); *United*

States v. Wilkus, 875 F.2d 649, 655 (7th Cir.) *cert. denied,* 493 U.S. 865, 110 S.Ct. 184, 107 L.Ed.2d 139 (1989); *United States v. Vretta,* 790 F.2d at 658-659; *Huff v. White Motor Corp.*, 609 F.2d at 295, although sheer need alone does not justify admission. *United States v. Snyder,* 872 F.2d at 1355.

The court cannot find that Mr. Cartwright's testimony is admissible under Rule 803(24) to prove the truth of what he was told about the spills. The cases discussed above indicate that with very rare exceptions, the declarants' identities and the basis of the declarants' knowledge must be known. Without such knowledge, the court cannot evaluate the declarants' disinterest, motivation, personal knowledge, general truthfulness, or consistent repetition. For example, in *Cook v. Hoppin,* 783 F.2d at 691, the court found error in admission of statements under Rule 803(24) when the declarants' identities were unknown, and the declarants themselves may have based their statements on hearsay. Under such circumstances, the court held, an analysis cannot even begin as to whether the statements have the requisite circumstantial guarantees of trustworthiness.

Mr. Cartwright was asked the names of the persons with whom he spoke, and he provided six names. He was unable, however, to recall what he was told by each of them. Accordingly, the analysis required by Rule 803(24) cannot be satisfied.

Mr. Cartwright's deposition testimony may be considered, but only insofar as it is offered to establish that the plaintiffs engaged in an investigation of the spills. It is inadmissible, and so may not be considered on summary judgment, to establish that spills occurred.

2. Gary Emerson

Mr. Emerson testified to having seen TCE end up on the ground when trucks filled the tanks on ten to fifteen occasions from the "late seventies up through early

eighties", although he could not provide exact dates. The earliest such occasion was about 1978. Detrex moves to strike Mr. Emerson's testimony as irrelevant because he did not identify the delivery company, so the spills cannot be attributed to Detrex. Detrex argues that this uncertainty causes the potential for unfair prejudice to substantially outweigh the testimony's probative value. The court disagrees.

The record indicates that Detrex was the plaintiffs' sole supplier of TCE from 1978 to 1986, the years encompassing Mr. Emerson's observations. That Detrex employed Transport drivers on fifteen deliveries does not render Mr. Emerson's testimony unduly prejudicial, because Detrex may be liable under 42 U.S.C. § 9607 (a)(3) for arranging transport for disposal of a hazardous substance.

Detrex's motion to strike Mr. Emerson's deposition testimony must be denied.

3. John Graber

Mr. Graber testified that in the early to mid-1980s, he "heard about a spill out in the back" "from different people around the plant here, talking about it." He heard that somebody fell asleep while filling the tank, causing an overflow. Detrex objects on hearsay grounds.

The plaintiffs first respond that the Graber testimony is offered only to corroborate other evidence of the overflow spill. If the testimony is offered to prove the fact of the spill, however, it is hearsay. The plaintiffs then argue that the evidence is admissible to establish the time of the overflow spill, placing it in the years in which Detrex was the plaintiffs' sole supplier of TCE. The plaintiffs offer no authority for this use of the evidence. Finally, the plaintiffs argue that Mr. Graber's testimony is admissible under Rule 803(24). Mr. Graber's testimony provides no basis for evaluating the declarant, how-

ever; the sources of his information are completely unidentified. Accordingly, for the reasons set forth in the discussion with respect to Mr. Cartwright's testimony, Rule 803(24) provides no vehicle for admissibility.

Detrex's motion to strike the deposition testimony of Mr. Graber must be granted.

4. Ed Hosea

Mr. Hosea testified to the overflow spill that destroyed the asphalt. He testified that he was not at the plant on the day it occurred, but was told when he got back. He was told by "somebody" to look at the asphalt, and "they said" a Detrex driver had failed to hook his equipment up properly. He was unable to recall the date.

Detrex moves to strike on hearsay grounds. The plaintiffs respond with the first and third arguments raised with respect to Mr. Graber's testimony. For the reasons discussed above, those arguments must fail.

Detrex's motion to strike Mr. Hosea's testimony must be granted.

5. Richard Mann

Mr. Mann testified to having heard of the overflow spill and to having seen delivery spills, although he could not specify the time period in which he observed the delivery spills. Detrex moves to strike the testimony concerning the overflow spill as hearsay, and moves to strike the testimony concerning the delivery spills under Rule 403.

Mr. Mann's testimony about the delivery spills has substantial probative value that outweighs any risk of unfair prejudice. His testimony that the time period about which he spoke was before the second TCE storage tank was installed, an event that occurred after Detrex became sole supplier, makes his observations rele-

vant, and the risk of unfair prejudice is negligible at the summary judgment stage.

With respect to the testimony about the overflow spill, the plaintiffs again seek refuge in Rule 803(24). Unlike most of the other declarants at issue in the motion to strike. Mr. Mann identified the source of his information: he said he heard about spill from Mr. Todd and night watchman Dewel Abner. As is discussed below, Mr. Todd says his information came in part from Mr. Mann; testimony that seeks its requisite foundation of personal knowledge from declarants who each disclaim personal knowledge cannot be said to bear sufficient circumstantial guarantees of trustworthiness.

The case for admissibility is stronger to the extent Mr. Mann was relating what he learned from Dewel Abner, who has not (in this record) denied personal knowledge. Mr. Mann's attribution is, however, the only mention of Mr. Abner that the court has found in the record before it. The record contains nothing to suggest a basis for a determination of Mr. Abner's character for truthfulness, the consistency of his statements, or even the basis of his knowledge. Accordingly, the court must conclude that Mr. Mann's testimony about the overfill spill is inadmissible hearsay.

The motion to strike Mr. Mann's testimony about the delivery spills should be denied. The motion to strike Mr. Mann's testimony about the overfill spills must be granted.

6. Robert Todd

Mr. Todd was EPC's plant engineer. He testified to having observed the open-valve spill. He also testified to having been told of the overflow spill by John Graber, Dick Mann (and perhaps others), having seen the overflow spill's aftermath on the asphalt parking lot, and having suggested that the repair bill be sent to Detrex.

Detrex objects to Mr. Todd's testimony about what caused the damage to the asphalt.

The plaintiffs respond by noting that shortly after the overflow spill, Mr. Todd wrote a memo, now lost, about the incident. The memo was based on information he had received from an EPC employee with first-hand knowledge of the incident. The memo, the plaintiffs argue, satisfied all requirements for a record of regularly conducted activity, and hence would be admissible under Fed.R.Ev. 803(6); accordingly, they conclude, Mr. Todd should be able to testify to the memo's contents in light of its unavailability. *See* Fed.R.Ev. 1004.

The court's research has disclosed no case that addresses the admissibility of verbal recollection of a lost business record prepared eleven years earlier, and the parties' research presumably has been equally fruitless. The cases cited by the plaintiffs relate to lost written instruments upon which suit was based, rather than written accounts of allegedly negligent acts. Assuming that Mr. Todd would be allowed to testify to the content of the lost memorandum, however, he did not do so. The deposition contains no suggestion that he was recounting, or was asked to recount the content of the lost memorandum; he was testifying to his recollection of what others told him. That he may have made a contemporaneous memorandum does not render his recollection of what others told him admissible over a hearsay objection.

The plaintiffs also argue that Mr. Todd's testimony is admissible under Rule 803(24). They point to the circumstantial guarantees of trustworthiness present when one reports to his superiors, citing *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 700 F.2d 785, 818 (2nd Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984). Mr. Todd, however, testified that his information about the overflow spill came from John Graber and Dick Mann. Mr. Mann, however, testified that he learned of the overflow

spill from Mr. Todd, and Mr. Graber testified that he learned of the overflow spill from unidentified persons. Given that both identified sources of Mr. Todd's information disclaim personal knowledge of the overflow spill (although Mr. Todd also may have acquired information from others not identified, whose personal knowledge cannot be evaluated), the court cannot find that Mr. Todd's testimony bears sufficient circumstantial guarantees of trustworthiness for admissibility under Rule 803(24).

Detrex also moves to strike the portions of Mr. Todd's testimony in which he stated that the damage to the asphalt was caused by TCE. The court is not willing to hold that Mr. Todd lacks sufficient experience and training to testify that the damage he personally observed was consistent with a spillage of TCE. Even accepting the testimony to that extent, however, Mr. Todd has demonstrated no basis, other than inadmissible hearsay, for any opinion that the damage was caused by an overfill spill or by Detrex's negligence.

The motion to strike Mr. Todd's testimony concerning the overfill spill must be granted.

7. Henry Copenhaver

Mr. Copenhaver, an EPC employee, testified in his deposition that Bob Todd had told him "that there was a spill and that we should contact whoever was involved in it and make them aware." He does not recall speaking to any supplier, although he identified the purchase orders for asphalt repair. Detrex moves to strike Mr. Copenhaver's testimony about the conversation with Mr. Todd.

The plaintiffs argue that Mr. Copenhaver's testimony is admissible to show notice to Detrex and is admissible under Rule 803(24). As discussed with respect to the Cartwright testimony, if the testimony is offered only to

show notice, it is not hearsay. Mr. Copenhaver's testimony does not, however, show notice to Detrex; Mr. Copenhaver denied any recollection of notifying Detrex or any other supplier. The plaintiffs point to the testimony of Stan Miles of Detrex, who testified that Mr. Copenhaver called him and said there had been a spill and that Mr. Copenhaver would check into it. The Miles testimony is probative of notice, but the Copenhaver testimony is not.

The Copenhaver testimony is not admissible under Rule 803(24). Mr. Copenhaver knows no more about the overfill spill than Mr. Todd told him, and Mr. Todd's knowledge cannot be traced to anyone with personal knowledge of the overfill spill.

Accordingly, Detrex's motion to strike the Copenhaver testimony must be granted.

Robert Peterson

Mr. Peterson described the overflow spill. He disclaimed any personal knowledge of the spill; he heard about it from Mr. Todd. He also testified that when he was presented with the invoice to replace the asphalt parking lot, someone (he does not recall who) told him of the spill, and he relayed the information to Detrex. Detrex moves to strike on hearsay grounds.

The plaintiffs make several arguments in support of admissibility. First, they note that evidence introduced to show why a person acted as he did is not hearsay, citing *United States v. Amahia*, 825 F.2d 177, 181 (8th Cir.1987). This argument is correct, although it would preclude the court from viewing Mr. Peterson's testimony as substantive proof of the overflow spill. *See United States v. Martinez*, 939 F.2d 412, 415 (7th Cir.1991).

The plaintiffs also argue that Mr. Peterson's testimony falls within Rule 803(24). Everything Mr. Peterson related about the overflow spill, however, came from Mr.

Todd who, in turn, testified that his information came entirely from persons who disclaim personal knowledge of the overflow spill or unidentified persons. Notwithstanding the presence of some guarantees of trustworthiness inherent in a process of reporting within a business, the evidence nonetheless amounts to a totem pole of hearsay of undetermined length: Mr. Peterson relates what he was told by Mr. Todd, who relates what he was told by Messrs. Graber and Mann, who related what they were told by others, whose personal knowledge is uncertain.

Finally, the plaintiffs argue that Mr. Peterson's testimony is against his pecuniary interest, Fed.R.Ev. 804 (b)(3), noting that Mr. Peterson was a defendant in the plaintiffs' parallel state court action. While such an argument might [3] render Mr. Peterson's statements admissible, it would not render admissible statements other persons made to Mr. Peterson; Detrex's motion to strike is addressed to the statements of others. *See* Fed.R.Ev. 805.

9. Dennis Selner

Mr. Selner testified to having seen the damage to the asphalt after the overfill spill. What he knows about the spill is what Mr. Todd told him. Detrex moves to strike his testimony about the cause of the spill on hearsay grounds. Again, the plaintiffs argue for admissibility under Rule 803(24). As discussed above, Mr. Todd (Mr. Selner's source of information) had no personal knowledge about the overfill spill, and acquired his information either from unidentified persons or from persons who also lacked personal knowledge. For the reasons discussed above, the court cannot find Mr. Selner's

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[3] **The plaintiffs would have to provide a further explanation of why Mr. Peterson's challenged testimony was against his pecuniary interest, a point not immediately apparent from the deposition excerpt.**

challenged testimony to be admissible under Rule 803(24).

The motion to strike Mr. Selner's testimony about the overfill spill must be granted.

10. David Smith

Mr. Smith testified to what Mr. Todd told him about the overfill and open-valve spills, to having seen the asphalt the day following the overfill spill, and to Mr. Todd having told him about Mr. Copenhaver's contact with Detrex about the incident. Detrex moves to strike these portions of Mr. Smith's deposition testimony as hearsay.

The plaintiffs argue that Mr. Smith's testimony is admissible under Rule 803(24). They stress the consistency of Mr. Smith's testimony about the overfill spill with the accounts of others. Although consistency may be pertinent to determining admissibility under Rule 803(24), it is not determinative; repetition does not render hearsay admissible. More persuasive is the absence of any person shown to have personal knowledge of the overfill spill. If, as decided above, Mr. Todd cannot testify to what he was told about the overflow spill, Mr. Smith cannot testify to what Mr. Todd told him.

Because the summary judgment record already contains Mr. Todd's deposition testimony (based on personal knowledge) about the open valve spill and Mr. Miles's testimony about the conversation with Mr. Copenhaver, the motion to strike the remaining challenged portions of Mr. Smith's testimony is moot.

The motion to strike Mr. Smith's testimony must be granted insofar as it relates to the overfill spill.

11. Conclusion

Following ruling on the pertinent portions of the motion to strike, the court agrees with Detrex in part. There

is no evidence in compliance with Federal Rule of Civil Procedure 56(e) with respect to the overfill spill. To the extent the plaintiffs' claims arise from that allegation, Detrex is entitled to summary judgment. There is, however, evidence of compliance with Federal Rule of Civil Procedure 56(e) with respect to the delivery spills and the open-valve spill; to the extent the plaintiffs' claims arise from those allegations, the claims survive. CERCLA imposes no quantitative requirement on a release. *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 735 F.Supp. 358, 361-362 (W.D.Wash. 1990).

B. Second Motion to Strike

Detrex's second motion to strike addresses a document the plaintiffs submitted as an attachment to their reply to Detrex's response to the plaintiffs' partial summary judgment motion. Because that attachment neither strengthens the plaintiffs' case with respect to the overfill spill nor weakens the case with respect to the delivery spills and the open-valve spill, the issue is moot. The court is compelled to add, however, that Detrex's argument that the submission offends the district rules on summary judgment motions does not impress the court.

District Rule 13 requires one opposing a summary judgment to identify the fact issues the opponent believes are in genuine dispute. Detrex has not done so, despite repeated reminders by the plaintiffs. As the plaintiffs note, the failure to comply with such a rule may constitute grounds for granting the summary judgment motion. *See, e.g., Appley v. West*, 929 F.2d 1176 (7th Cir. 1991). The court has declined to follow that course in this case because Detrex has opposed the plaintiffs' motion vigorously, relying on the inadmissibility and absence of the plaintiffs' proof. Detrex's papers adequately idenify those issues pertinent to summary judgment. The court believes it inappropriate, however, for a party who has ignored the rules to move to strike an adversary's submissions for failure to comply with the rules.

C. Evidence of Compliance with NCP

Detrex also moves to strike an exhibit to the plaintiffs' summary judgment motion and the deposition testimony of John Mundell.

Exhibit 1 to the plaintiffs' memorandum in support of the summary judgment consists of a report prepared by ATEC Associates, Inc., entitled *Review of Investigation and Remedial Activity Consistency with the National Oil and Hazardous Substances Pollution Contingency Plan.* Exhibit 13 is a portion of the deposition testimony of John Mundell, an ATEC employee. Plaintiffs' counsel contacted Mr. Mundell to review the documents and activities associated with the EPC site and determine whether the plaintiffs' investigative and remedial activities complied with the NCP. The report reviews the investigations of soil and groundwater contamination and remediation efforts at the EPC site and concludes that these efforts complied with the NCP.

Detrex asserts that the ATEC Report and Mr. Mundell's testimony are inadmissible expert opinions on a question of law. The plaintiffs argue that their consistency with the National Contingency Plan is a question of fact, and expert opinion is, therefore, appropriate.

Both parties cite *County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1512 (10th Cir. 1991), in which the court determined that consistency with the NCP is an element of the CERCLA plaintiff's *prima facie* case. However, as the plaintiffs note, the court's determination on consistency with the NCP was made after an extensive factual record had been established. This point was made by *Carlyle Piermont Corp. v. Federal Paper Board Co.*, 742 F.Supp. 814, 819 (S.D.N.Y.1990), in which the court concluded that genuine issues of fact existed as to whether the plaintiff's action was removal or remedial, and whether the plaintiff complied with the appropriate NCP requirements. *See also Amland Properties Corp. v.*

Aluminum Co. of America, 711 F.Supp. 784, 794 (D.N.J.1989).

The plaintiffs also cite *United States v. Mottolo*, 695 F.Supp. 615, 630 (D.N.H. 1988), in which the court stated that consistency with the NCP "is a triable issue of fact which goes to the amount, not the fact, of defendants' liability."

Detrex cites *Channel Master Satellite Systems, Inc. v. JFD Electronics Corp.*, 748 F.Supp. 373, 386 (E.D.N.C. 1990), in which the court determined that the classification of an action as removal or remedial was an issue of law not suited for expert testimony. The court noted a factual dispute as to the cost effectiveness of the response action, which is one factor in compliance with the NCP. However, as to the other factors, the court found that the plaintiff did not substantially comply with the NCP requirements and summary judgment was appropriate.

The plaintiffs argue alternatively that if the determination of consistency with the NCP is a question of law, it still is appropriate to admit expert opinion testimony on this issue. The regulations are complex, and expert testimony would aid the court.

The plaintiffs also contend that even if the expert opinion is inadmissible as to consistency with the NCP, it is admissible as a summary of facts, citing *United States v. Schafer*, 580 F.2d 774 (5th Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 463, 58 L.Ed.2d 430 (1978). *Schafer* was a prosecution for tax evasion in which an IRS agent testified as an expert, giving his opinion as to the proper computation of the defendant's tax liability. The IRS agent prepared two charts summarizing the evidence presented at trial, and stated that all his figures were based upon direct testimony or documents admitted into evidence. The Fifth Circuit determined that a solid evidentiary foundation had been laid for the opinion, which was based on facts in evidence and presented to a properly instructed jury. 580 F.2d at 778.

Obvious problems arise in viewing the ATEC report as a summary at this stage of the litigation. The opinions do not rely on documents admitted into evidence; nothing at all has been admitted into evidence. In the spirit of *McFeely v. United States*, 700 F.Supp. at 418, and *Reed v. Ford Motor Co.*, 679 F.Supp. at 875, this defect should be resolved in favor of the summary judgment motion's opponent, but since the plaintiffs and Detrex each have moved for summary judgment, such a resolution provides little assistance.

Courts proceeding under the Federal Rules of Evidence have demonstrated a reluctance to allow experts determine questions of law. *See, e.g., Specht v. Jensen*, 853 F.2d 805, 809-10 (10th Cir.1988), *cert. denied*, 488 U.S. 1008, 109 S.Ct. 792, 102 L.Ed.2d 783 (1989) ("when the purpose of the testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed. In no instance can a witness be permitted to define the law of the case"); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir.1986) ("the line must be drawn between proper expert evidence as to facts, inferences to be drawn from those facts, and the opinions of the expert, on the one hand, and testimony as to the meaning and applicability of the appropriate law, on the other hand").

The Seventh Circuit has recognized, however, that in highly technical areas of law, the opinion of a properly qualified expert is admissible to determine whether a given course of conduct complied with the law. For example, in *United States v. Windfelder*, 790 F.2d 576, 581 (7th Cir.1986), the court found no error in allowing an Internal Revenue Service agent to give an opinion as to the proper tax consequences of a particular action by a taxpayer, or in allowing the agent to offer an analysis of the taxpayer's action as a necessary precedent to the agent's evaluation of the tax consequences.

The *Windfelder* court cited with favor the Eleventh Circuit's decision in *United States v. Gold*, 743 F.2d 800, 817 (11th Cir.1984), *cert. denied* 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985). In *Gold*, the court found no error in allowing properly qualified witnesses to testify whether particular claims were eligible for reimbursement under Medicare, as long as the district court properly instructed the jury concerning the weight that should be given expert testimony.

The court cannot find that the NCP presents any less technical an issue than do the tax code and Medicare regulations. Accordingly, pursuant to *Windfelder* and *Gold*, the court overrules the motion to strike the ATEC report. The excerpt of the Mundell deposition might require a different analysis in light of the absence of any basis for the opinion in the summary judgment record, *see Mid-State Fertilizer v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir.1989), but the admissibility of the ATEC report renders moot the motion to strike the cumulative Mundell opinion testimony.

Accordingly, the motion to strike the ATEC report is denied; the motion to strike the Mundell testimony is denied as moot.

IV. SUMMARY JUDGMENT: THE CERCLA CLAIMS

Both parties move for summary judgment on the issue of liability on count I; Detrex also seeks judgment on several other counts. Detrex contends that the claims in Counts I and II are barred because: the plaintiffs failed to comply with the National Contingency Plan ("NCP") provided in CERCLA; the plaintiffs actively contributed to contamination at the site; and Detrex's sale of a useful product did not constitute the "disposal of hazardous waste" within the meaning of CERCLA.

A. Responsible Party

Summary judgment may be granted as to liability in CERCLA cases where the plaintiff established the elements of a prima facie case and demonstrates that none of the statutory defenses applies. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir.1989); *United States v. Mottolo*, 695 F.Supp. at 620, 631. The plaintiffs submit that they have established the following elements necessary for a private party to recover costs under CERCLA:

> (1) the defendant is a responsible party under CERCLA;
>
> (2) a release or a threatened release of hazardous substances occurred;
>
> (3) the plaintiffs incurred response costs; and
>
> (4) the response costs were necessary and consistent with the NCP.

42 U.S.C. § 9607. The plaintiffs note that CERCLA imposes strict liability, and, therefore, the plaintiff need not establish negligence. *General Electric Co. v. Litton Business Systems, Inc.*, 715 F.Supp. 949, 959 (W.D.Mo. 1989), *aff'd*, 920 F.2d 1415 (8th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1390, 113 L.Ed.2d 446 (1991); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir.1989); *Rodenbeck v. Marathon Petroleum Co.*, 742 F.Supp. 1448, 1455-56 (N.D.Ind.1990).

As discussed above, the plaintiffs have presented undisputed evidence that releases of TCE occurred through delivery spills and the open-valve spill between 1978 and 1986, when Detrex was the plaintiffs' sole supplier of TCE. The summary judgment record provides an inescapable inference, opposable only through the sort of "metaphysical doubt" that will not preclude summary judgment, *Matsushita Electric Industrial Co. v. Zenith*

Radio Corp., 475 U.S. at 586, 106 S.Ct. at 1355, that drivers of Detrex or Detrex's contractor, Transport, were responsible for those spills.

Detrex argues that it was not a responsible party under CERCLA with respect to spills by Transport drivers. Count I seeks to hold Detrex liable under 42 U.S.C. § 9607(a)(1) as the "owner and operator of a . . . facility"; 42 U.S.C. § 9601(9) defines "facility" as including a motor vehicle. Count II seeks to hold Detrex liable under 42 U.S.C. § 9607(a)(3), which addresses "any person who by contract . . . arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . ." 42 U.S.C. § 9601(29) incorporates the definition of "disposal" from the Solid Waste Disposal Act, 42 U.S.C. § 6903(3), which includes "spilling, leaking, or placing of any solid waste or hazardous waste on any land so that such solid waste or hazardous waste or any constituent thereof may . . . [be] discharged into any waters, including groundwaters."

Detrex points to 42 U.S.C. § 9601(20)(B), which states,

> In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except at provided in section 9607 (a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

Detrex argues that since Transport was acting as a common carrier when transporting TCE to EPC on fifteen occasions, Transport, and not Detrex, was the "owner and operator" with respect to any spills on those occasions.

The plaintiffs argue that Detrex has misread § 9601 (20)(B), which simply limits the liability of common carrier to specified circumstances. The plaintiffs argue that a contrary reading would be at odds with the policies behind CERCLA, as evidenced by the statutory structure and legislative history. *See* 126 Cong.Rec. E4196 (daily ed., Sept. 4, 1980); S.Rep. No. 848, 96th Cong., 2d Sess. 13 (1980). They argue that the third-party defense of § 9607(b)(3) would be superfluous.

In a case brought under § 9607(a)(1), however, the third-party defense is available to owners and operators, and the plaintiffs have tendered no theory under which Detrex could be found to be an "owner and operator of a . . . facility" when Transport delivered TCE in Transport trucks. Detrex cannot be said to have owned the Transport trucks; Detrex cannot be said to have operated the Detrex trucks. Detrex is not a responsible party under § 9607(a)(1) with respect to the deliveries by Transport.

Undisputed evidence indicates that Detrex drivers spilled TCE during its deliveries, and that the "open valve" spill occurred during a Detrex delivery. Accordingly, analysis of Count I must continue.

Under Count II, however, Detrex's liability under arises from its contract or arrangement with the plaintiffs to transport the TCE. 42 U.S.C. § 9607(a)(3) makes no reference to "owner and operator"; accordingly, it is immaterial whether Transport or Detrex or both were "owner and operator" with respect to the TCE transported in Transport trucks.

B. Consistency with NCP

To recover the costs of response to the release of a hazardous substance, a private party must have incurred response costs that are "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). The NCP

is the plan for removal of hazardous substances created by 42 U.S.C. § 9605; its requirements are set forth in 40 C.F.R. § 300. Proof that the response costs were consistent with the NCP is an element of a prima facie case for recovery under 42 U.S.C. § 9607. *County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1512 (10th Cir.1991).

1. Public Comment

Under the 1985 version of the NCP in effect when this case was filed, one seeking recovery under 42 U.S.C. § 9607 had to prove strict compliance with the NCP. The less onerous 1990 version in effect today requires substantial compliance with the NCP.[4] *County Line Investment v. Tinney*, 933 F.2d at 1514-15. Detrex argues that the 1985 version governs this case, but that the plaintiffs cannot show compliance under either standard. The plaintiffs argue that the 1990 version governs this case, but that they meet the requirements of both versions.

The plaintiffs cite the comments of the Environmental Protection Agency ("EPA") as support for the position that the EPA intended the "substantial compliance" standard of the 1990 version to apply retroactively. With regard to retroactivity, the EPA stated:

> Some commentators expressed the concern that PRPs [potentially responsible parties] may attempt to impose the new definition of "consistency with the NCP" on private cleanups that are already complete or underway. They assert that it should be made clear that the rule does not apply to private response actions initiated prior to the effective date of the revised NCP.

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[4] See 40 C.F.R. § 300.430(c), (e); 40 C.F.R. § 300.700(c)(6) (1990) ("Private parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action based on substantially equivalent state and local requirements.").

> In response, EPA does not believe that it is appropriate to grandfather cleanups that are already "underway." Such a position would result in an exemption from this rule for actions that were initiated prior to the effective date, but which may continue for years (such as long-term ground-water remediation actions). Further, EPA does not believe that this issue will pose a serious problem to private parties for several reasons. First, the rule's requirement of "substantial compliance" with potentially applicable NCP requirements afforded private parties some latitude in meeting the full set of revised NCP provisions. Second, private parties have been on notice for over a year that EPA intended to require compliance with the principal mandates of CERCLA—those required for a "CERCLA-quality cleanup," as discussed above—as a condition for being "consistent with the NCP." . . .
>
> Finally, the requirement for "consistency with the NCP" has been a precondition to cost recovery under CERCLA section 107 since the passage of the statute in 1980, and pursuant to the 1985 NCP, consistency with the NCP was measured by compliance with a detailed list of NCP requirements: thus, on-going actions should already comply with the 1985 provisions.

55 Fed.Reg. 8795 (1990).

Logic suggests that the plaintiffs' actions, taken between 1985 and 1990, should be governed by the 1985 NCP. It appears from the language quoted in the Federal Register that the EPA, whose views are entitled to substantial weight, *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984), intends for the private parties seeking response costs pursuant to CERCLA to meet the substantial compliance standard of the 1990 NCP. The court need not resolve the issue,

however, because here, as in *County Line Investment Co. v. Tinney*, 933 F.2d 1508, the results are the same under either analysis.

Under 40 C.F.R. § 300.67 of the 1985 version of the NCP, remedial actions must be provided to the public for review and comment for a period of at least twenty-one days, and in most circumstances, public meetings are to be held during the public comment period.

Detrex argues that the plaintiffs allowed the populace no involvement in the choice of remedy. In *Channel Master Satellite Systems, Inc. v. JFD Electronics Corp.*, 748 F.Supp. at 390, the court noted the importance of public knowledge and involvement in the selection of a remedial response, particularly in a dispute between private litigants, in which the public would be unrepresented by the State. In this case, however, the public was provided notice and an opportunity to review for thirty days the plaintiffs' application for a National Pollutant Discharge Elimination System ("NPDES") permit. The NPDES permit was to allow the plaintiffs to discharge that water which was extracted from the groundwater and treated to remove most of the TCE. No public hearing was held because the Indiana Department of Environmental Management did not consider the comments which were submitted as constituting significant public interest. The plaintiffs argue that this thirty day public comment period met the requirements of the NCP.

In *Astesian Water Co. v. Government of New Castle County*, 659 F.Supp. 1269 (D.Del.1987), *affirmed*, 851 F.2d 643 (3d Cir.1988), the court considered an argument that the plaintiff's feasibility study, which was the subject of two public meetings and a public hearing, met the requirements of 40 C.F.R. § 300.67. The district court concluded, however, that the plaintiff's feasibility study did not meet the definition of "feasibility study" within the meaning of the NCP and, therefore, the court did not resolve the factual dispute over whether the

proffered feasibility study was made available for public comment. "Public comment on a document that does not determine the nature and extent of a hazardous release or evaluate proposed remedies is not consistent with section 300.67(d)." 659 F.Supp. at 1297.

In this case, as in *Artesian Water*, the plaintiffs reasoned that the notice provided in the NPDES permit application satisfied the NCP public comment requirement. The information provided with the NPDES permit, however, does not appear to meet the requirements of the 1985 version of the NCP, because it does not set forth feasibility studies that outline alternative remedial measures. 40 C.F.R. § 300.67(d) (1986). Further, the 1985 version of the NCP contemplates that a public meeting should be held in most circumstances. In this case, although some members of the public had sent comments to the Indiana Department of Environmental Management, it was determined that a public meeting was not necessary because there had not been significant public interest.

Nonetheless, public comment was received. Members of the general public submitted comments to IDEM, and IDEM responded to them in writing. The public's comments related to the need for a public hearing, the method of filtering and monitoring the groundwater, and acceptable levels of contamination. Even the 1985 NCP did not require public hearings in all cases.

2. RI/FS

Detrex argues that the plaintiffs did not "provide an opportunity for public comment concerning the selection of the response action," as required by the 1990 version, because they did not submit a proposed plan that supplements the Remedial Investigation/Feasibility Study ("RI/FS"), as required by 40 C.F.R. § 300.430(f)(2) (1990). Further, the plaintiffs did not submit a plan to the public for comment. 40 C.F.R. § 300.430(f)(3) (1990).

Detrex notes that the purpose of the public comment period is to allow those most affected (nearby residents) to have a say in the type of remedial measures undertaken. Public notice of the NPDES permit was issued on March 9, 1988, but construction of the plaintiffs' choice of remedy, air stripping towers, was already under way in February 1988. Thus, Detrex argues, the public had no voice in the type of remedy.

The defendant in *General Electric Co. v. Litton Business Systems, Inc.*, 715 F.Supp. at 959, contended that the plaintiff did not comply with NCP's critteria for removal or remedial actions. Among other things, the defendant argued that the plaintiff should have provided for public comment. The court agreed with the plaintiffs that a public hearing was not required because GE was complying with legally applicable or relevant and appropriate state requirements that the waste be removed, and the input of the state natural resources department served as a substitute for public comment. "Statutes such as CERCLA which were enacted for the protection and preservation of public health are to be given an extremely liberal construction for the accomplishment of their beneficial objectives." 715 F.Supp. at 961. Detrex is correct *General Electric* is strictly on point because it concerned a removal action, while this case concerns a remedial action. Nonetheless, the admonition of liberal construction of statutes such as CERCLA applies with equal force to remedial actions under CERCLA.

In *County Line Investment Co. v. Tinney*, 933 F.2d at 1514, the Tenth Circuit noted that, "Both the 1985 and 1990 NCPs require, at a minimum, that a private party attempting to act 'consistent with the national contingency plan' provide an opportunity for public comment on its selection of the response action for the site." In *Tinney*, the plaintiffs did not involve the public in the selection of remedial measures, although they were in communication with state and federal officials and com-

plied with state regulations regarding the closure of their landfill. In this case, however, public comment was invited in the notice of the application for the NPDES permit. Members of the public submitted comments, to which state officials responded. Further, had the state officials decided that there was significant public interest, a hearing on the NPDES application would have been held.

Therefore, the court concludes that the plaintiffs complied with the "public participation" requirements of both the 1985 and 1990 versions of the NCP.

Detrex also contends that the plaintiffs did not formulate and tender for public comment a RI/FS pursuant to the 1985 NCP. Under the 1985 NCP, 40 C.F.R. § 300.68,[5] a RI/FS must be conducted before remedial action is taken pursuant to CERCLA in order to determine the nature and extent of the threat posed by the release of a hazardous substance and in order to evaluate proposed remedies.

In *Artesian Water Co. v. Government of New Castle County*, 569 F.Supp. 1269, the court determined that a report known as "Water 2000" did not meet the criteria for a RI/FS set forth in the 1985 NCP. The report did not evaluate alternative remedies, and the affidavit of the administrator of the agency that drafted the Water 2000 report stated that water supply options and removal and remedial actions were never considered specifically from the standpoint of providing a replacement for contaminated groundwater. 659 F.Supp. at 1295. Therefore, the court concluded that the Water 2000 report was inconsistent with the NCP, holding that while another, redundant RI was unnecessary, "any document purporting to comply with the FS requirement must evaluate alternatives for remedying a release of hazardous substances, and this the Water 2000 report utterly fails to do." 659

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[5] Both parties analyzed the plaintiffs' compliance with the RI/FS requirements under the 1985 version of the NCP.

F.Supp. at 1295-96. Detrex claims that in this case the plaintiffs conducted no study.

The plaintiffs offer Exhibit 1 to their motion partial summary judgment motion, the report by ATEC Associates, as proof that they complied with the NCP. The ATEC report refers to documents upon which ATEC relied in forming its opinion as to compliance with the NCP. The reference to those documents indicates that the plaintiffs engaged in an investigation of the contamination and possible remedies. Detrex challenges the legal sufficiency of the ATEC report, but offers no opposing evidence. As noted above, the ATEC report is not legally insufficient. It stands as undisputed evidence that the plaintiffs complied with the RI/FS requirements of the NCP.

C. Clean Hands Defense

Detrex argues that the plaintiffs cannot recover response costs pursuant to CERCLA because EPC actively contributed to contamination at the manufacturing site. Detrex submits evidence that EPC employees saw TCE waste oil, known as "stillbottoms", on the ground in the waste storage area, that a forklift driven by an EPC employee punctured a drum containing TCE, that TCE dripped from the hand degreaser onto the floor, that many years ago EPC employees washed their tools and the floor with TCE, and that various accidents caused TCE spills. Detrex claims that Congress did not intend for parties that pollute to recover response costs. Detrex cites several cases which, it claims, implicitly support this conclusion. However, the court agrees with the plaintiffs that the cases Detrex cites do not support the conclusion that a party that has been responsible for groundwater contamination cannot recover response costs from another party that is responsible for contamination.

In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d at 1418, the defendant

claimed that the plaintiff could not recover under CERCLA because the plaintiff was motivated by the desire to avoid liability rather than the desire to respond to hazardous substance pollution. The Tenth Circuit rejected the notion that unclear hands is a defense to CERCLA liability. The court noted that CERCLA is a strict liability statute, subject only to the defense that the release was caused by an act of God, an act of war, or the unforeseeable acts of a third party not in a contractual relationship with the defendant, who was exercising due care with respect to the hazardous substance. *See also Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 90 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1029, 109 S.Ct. 837, 102 L.Ed.2d 969 (1989); *United States v. Kramer*, 757 F.Supp. 397, 428 (D.N.J. 1991).

In *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F.Supp. 1100, 1119 (N.D.Ill.1988), the district court discussed expressed Congressional intent to allow wrongdoers to recover against their compatriots, and noted that an "unclean hands" defense would undermine the policies on which CERCLA is based, because willing contributors would postpone cleanup until all agreed to participate. 691 F.Supp. at 1119. This court agrees with the *Allied* court that applying the unclean hands doctrine against a CERCLA plaintiff who may have caused the release of hazardous substances would defeat CERCLA's purpose. The plaintiffs' possible contribution to groundwater contamination does not bar their CERCLA claims.

D. Disposal

Count II alleges that Detrex arranged for the disposal of TCE. Detrex argues that it is not liable because its sale of TCE, a useful manufacturing chemical, was not a disposal under 42 U.S.C. § 9607(a)(3). Detrex relies on *Prudential Insurance Co. of America v. United States Gypsum*, 711 F.Supp. 1244, 1254-1255 (D.N.J.1989),

which held that since there was no affirmative act to get rid of asbestos except by sale for use as part of a complete, useful product, there was no disposal, notwithstanding that the asbestos eventually began to pose a health risk by flaking off. The transfer was not tantamount to a disposal. *See also Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F.Supp. 651 (N.D.Ill.1988), *affirmed*, 861 F.2d 155 (7th Cir.1988).

The plaintiffs respond with the definition of "disposal" found in the Solid Waste Disposal Act, 42 U.S.C. § 6903 (3):

> The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

CERCLA incorporates this definition of disposal. 42 U.S.C. § 9601(29). The plaintiffs also note that *Prudential Insurance* involved a claim for compensation for the removal of asbestos, and the court found that CERCLA did not apply to asbestos-containing products that were useful when sold and used as intended. The TCE at issue here, however, was not useful after it was spilled on the ground. If the TCE was spilled when it was delivered, it was not used as intended by the parties.

In *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F.Supp. 651, the court found that liability did not attach to an innocent supplier of a hazardous substance who made no decision to dispose of the hazardous substance. The plaintiffs argue that Detrex made decisions as to delivery, and that their spills during delivery constitute disposals.

The court agrees with the plaintiffs. Although the plaintiffs selected the site of delivery, Detrex selected the

method of delivery and the safeguards that would surround the deliveries. The plaintiffs had no say in whether the Detrex driver would close the valve on the day of the "open valve" spill.

E. Conclusion

Based on the foregoing, the court concludes that the defendants are entitled to judgment as a matter of law on Count I insofar as Count I relies on the alleged overflow spill or delivery spills by Transport drivers. Judgment on the overflow spill claim is appropriate because the summary judgment record contains no evidence that Detrex caused an overflow spill. Judgment on the delivery spills is appropriate because there is no showing that Detrex was an "owner and operator" on those occasions.

Insofar as Count I is based on the open-valve spill and delivery spills during deliveries by Detrex drivers, however, the plaintiffs have demonstrated their entitlement to judgment as a matter of law on the issue of liability. Undisputed evidence demonstrates that Detrex owned and operated the trucks, and hence was a responsible party. Undisputed evidence indicates that Detrex caused a release of a hazardous substance on those occasions. Undisputed evidence (the ATEC report) indicates that the plaintiffs incurred response costs that were necessary and consistent with either potentially applicable version of the NCP.

Insofar as Count II is concerned, the defendants are entitled to judgment as a matter of law insofar as that count is based on the alleged overfill spill. The defendants are not entitled to judgment as a matter of law on the remaining issues in Count II, and the plaintiffs have not sought summary judgment on Count II.

V. STATE LAW CLAIMS

The remaining counts of the complaint at issue in this motion are based on common law. The parties agree that Indiana law applies.

A. Breach of Contract; Notice

Count IV of the complaint alleges that an implied term existed in the contract between the plaintiffs and Detrex that required Detrex to deliver TCE without spillage and without causing environmental damage. The plaintiffs allege that Detrex breached this implied term. Detrex seeks summary judgment, arguing that the parties' transaction was a sale of goods, governed by the Uniform Commercial Code. Under IND.CODE 26-1-2-607(3)(a), for a buyer to recover for a seller's breach, "The buyer must, within a reasonable time after he discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy." Detrex contends that the plaintiffs did not give Detrex timely and sufficient notice of its breach to entitle them to a remedy.

Detrex notes that though spills allegedly occurred in the early 1980s, the plaintiffs waited until 1986 to "voice their displeasure" in an August 27, 1986 letter notifying Detrex that EPC had a claim against Detrex arising out of spillage at the EPC plant. The letter informed Detrex that Miles Laboratories had asserted that EPC is liable for sewer charges Miles had incurred in disposing of contaminated water. The letter also informed Detrex that an investigation revealed that TCE had migrated from EPC to Miles' property. Detrex states that this letter is the only formal notice it received.

Detrex argues that a seller has a right to rely upon a transaction's finality after an elapse of time, citing *Courtesy Enterprises, Inc. v. Richards Laboratories*, 457 N.E.2d 572, 577 (Ind.App.1983). The *Courtesy Enterprises* court stated that if "the buyer knew of the existence of

alleged defects within a reasonable period of time and did not notify the seller of his dissatisfaction for some time after that, his actions would not be those of a reasonable merchant concerned with saving the transaction and with avoiding litigation." 457 N.E.2d at 577.

Detrex is correct that timely notice of a seller's breach "is a substantive condition precedent to recovery" and a "buyer's failure to provide timely notice waives its right to assert any breach." *McClure Oil Corp. v. Murray Equipment, Inc.*, 515 N.E.2d 546, 554 (Ind.App.1987). The plaintiffs, however, argue that no particular form of notice is required, and submit that EPC gave Detrex notice of an overfill spill in 1980. They note the telephone call in which Copenhaver of EPC told Mr. Miles of Detrex that there had been a spill. As noted above, however (*see* Part III-A, *supra*), the summary judgment record does not establish the overfill spill's occurrence. Notice of an alleged event on which suit cannot be based cannot satisfy the requirement in IND.CODE 26-1-2-607 (3)(a) of timely notice with respect to the other, actionable breaches.

The plaintiffs also argue that their 1986 letter was timely because the time for notification begins to run when the buyer knew of should have known of the breach. They argue that the reasonableness of any delay in notifying the seller of a breach depends on the nature of the breach, the type of purchaser, and the possible prejudice to the seller. If the breach is a latent one, the reasonable time for giving notice begins to run when the breach should have been discoverable. The plaintiffs did not learn of the TCE contamination in the soil and groundwater until March, 1986.

The evidence upon which the plaintiffs rely to establish the occurrence of the delivery spills and open-valve spills defeat this argument. The breach alleged in Count IV consist of spills, not groundwater contamination. The plaintiffs knew of those spills when they occurred,

but did not notify Detrex until years later. Detrex is entitled to judgment as a matter of law on Count IV.

B. Trespass

Count V asserts that Detrex committed a trespass when it spilled TCE at the site. Detrex claims that the plaintiffs cannot meet their burden of proving the essential elements of trespass under Indiana law, which are: (1) that the plaintiff was in possession of the land; and (2) that the defendant entered the land without right. *Sigsbee v. Swathwood*, 419 N.E.2d 789, 799 (Ind.App.1981). Detrex argues that because it had permission to enter the EPC premises to make deliveries, it cannot be liable for trespass. *See Bennett v. McIntire*, 121 Ind. 231, 23 N.E. 78 (1889); *City of Bloomington v. Westinghouse Electric Corp.*, 891 F.2d 611, 615 (7th Cir.1989).

The plaintiffs claim that although Detrex initially had permission to enter the EPC site, it exceeded the scope of its permission and became a trespasser when it spilled TCE. They cite *Indiana & Michigan Electric Co. v. Stevenson*, 173 Ind.App. 329, 363 N.E.2d 1254 (1977), in which property owners claim that a public utility committed a trespass and an unconstitutional taking when it which entered their land with permission to conduct a survey and cut growing crops to complete its task. The court determined that the utility company had no right to destroy the crops. 363 N.E.2d at 1259-60. The court employed a Fifth Amendment analysis, however, and did not explicitly state that the defendants' action amounted to a common law trespass.

Detrex cites several Indiana cases for the proposition that a party entering upon the land of another with permission does not become a trespasser even if the party abuses the privilege. *See Bennett v. McIntire*, 121 Ind. 231, 23 N.E. 78 (1889). In *Spades v. Murray*, 2 Ind. App. 401, 405, 28 N.E. 709, 710 (1891), the Court of Appeals stated that where a party enters with authority

and then exceed or abuses its authority, no trespass has been committed, and relief must be found under another remedy. *See also* Restatement (Second) of Torts § 214.

The case law convinces the court that the plaintiffs have no state law trespass remedy against Detrex. There is no dispute that Detrex drivers had permission to enter the EPC site. The claim that Detrex negligently and recklessly spilled TCE while at the site does not make Detrex or its drivers trespassers. Therefore, Detrex is entitled to summary judgment as to Count V.

C. Drivers' Negligence

In Count VI, the plaintiffs alleeg that the drivers who delivered TCE were negligent. Detrex claims that this court must fail because the plaintiffs present no evidence respecting the applicable standard of care for truck drivers delivering chemicals in the 1980s and 1980s. Detrex contends that expert testimony is required to establish the standard of care for handling TCE. Detrex cites *Ellis v. Smith*, 528 N.E.2d 826, 828 (Ind.App.1988), a medical malpractice action in which the plaintiff claimed that he did not give informed consent for an operation. The court stated that, "The general rule is that expert medical opinion testimony is required to establish the content of reasonable disclosure unless the situation is clearly within the realm of laymen's comprehension, as where disclosure is so obvious that laymen could recognize the necessity of such disclosure."

The plaintiffs offer several cases in which the courts have stated that in negligence actions there is one standard of care—that of a reasonable person under the circumstances. *See Neal v. Home Builders, Inc.*, 232 Ind. 160, 111 N.E.2d 713 (1953); *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675, 678 (Ind.App.1981); *P-M Gas & Wash Co., Inc. v. Smith*, 178 Ind.App. 457, 383 N.E.2d 357 (1978). The court agrees with the plaintiffs' argument that the reasonable

handling of TCE is not beyond the ken of the ordinary layperson. Although the ordinary person is not familiar with the chemical properties of TCE, the ordinary person can understand that TCE is a hazardous substance which should be handled in such a way that it is not released into the environment. Therefore, unlike the situation in medical malpractice cases, in this case, expert testimony on the reasonable standard of care is not a necessary element in the plaintiffs' prima facie case.

The plaintiffs also argue that Detrex's conduct constitutes negligence *per se* because Detrex violated a legal duty to report and clean up its TCE spills, as set forth in IND.ADMIN.CODE tit. 330.1, r. 1-6-2 (1974). The violation of a statute intended to protect the class of persons in which the plaintiff is included and intended to prevent the type of harm which has occurred as a result of the violation of statute is negligence *per se*. *Rubin v. Johnson*, 550 N.E.2d 324, 329 (Ind.App.1990). Although violation of a statute may be negligence *per se*, however, violation of an administrative regulation is only evidence of negligence under Indiana law. *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157, 1160, n. 3 (Ind.App.1988). Therefore, the court cannot conclude that Detrex's failure to report, contain, and clean up the TCE spill in violation of an Indiana regulation is negligence *per se*.

The plaintiffs also cite 42 U.S.C. § 9603(a), which imposes a duty upon a person in charge of a facility to notify the National Response Center "as soon as [the person] has knowledge of any release . . . of a hazardous substance from such . . . facility in quantities equal to or greater than those determined pursuant to section 9602. . . ." However, the plaintiffs have not established that Detrex had any knowledge of a release of a certain quantity of TCE.

Although the court does not accept the plaintiffs' theory that negligence per se applies to this case, the court

declines to grant summary judgment in Detrex's favor as to Count VI.

D. Negligent Hiring

Detrex claims that summary judgment should be granted in its favor as to Count VII, which alleges that Detrex negligently hired and trained its delivery drivers. Detrex claims that to prevail on this count, the plaintiffs would have to prove that Detrex negligently hired and trained each of the five drivers who delivered TCE to EPC, apparently because it has not been established which driver or drivers spilled TCE during delivery. Detrex notes that no evidence established that any of the drivers had a poor driving record or that any of the drivers had a physical or mental handicap or a criminal disposition. The record before the court does not show that any of the drivers had been fired from a previous job, although Detrex fired one of the drivers because of his inability to handle the truck.

Indiana recognizes a cause of action based on negligent hiring, *Tindall v. Enderle,* 162 Ind.App. 524, 320 N.E.2d 764 (1974), but the negligent hiring theory applies only to special situations, and is not applicable when the employer stipulates that the employee was acting within the scope of his or her employment. *Tindall,* 320 N.E.2d at 767-68; *Lange v. B. & P. Motor Express, Inc.,* 257 F.Supp. 319 (N.D.Ind.1966). In such cases, "the doctrine of *respondeat superior* provides the proper vehicle for a direct action aimed at recovering the damages resulting from a specific act of negligence committed by an employee within the scope of his employment." *Tindall,* 320 N.E.2d at 768.

The plaintiffs contend that the two drivers who were deposed admitted that they had spilled TCE in deliveries at other places. The deposition testimony indicates that one driver, Dennis Butler, was present at a TCE spill, but does not state that these drivers caused spills. Fur-

ther, the plaintiffs contend that the drivers' training was "minimal". No such conclusion may be reached without reference to standard practice in training drivers of hazardous substances. The two drivers' depositions indicate that they received literature informing them of the nature of TCE and they were instructed in how to handle it. Therefore, the court agrees with Detrex that summary judgment should be granted as to the claim in Count VII that Detrex negligently hired and trained its drivers.

The plaintiffs also argue that the doctrine of *res ipsa loquitur* applies to this case. Under this doctrine, an inference of negligence is created by a showing that (1) the injuring instrumentality was under the exclusive management and control of the defendant or his servants and (2) in the ordinary course of things, such an accident does not occur if those with management and control use proper care; such a showing shifts a burden of production to the defendant. *Hammond v. Scot Lad Foods, Inc.*, 436 N.E.2d 362, 364 (Ind.App.1982).

The plaintiffs have not produced evidence to show that the instrumentality which caused TCE contamination was within Detrex's exclusive control. As the parties have agreed, Detrex used an independent carrier to make several of the TCE deliveries. Therefore, even if the spills occurred because of Transport's negligence and Detrex is liable under CERCLA for Transport's negligence, the evidence does not show that Detrex has exclusive control over Transport. Therefore, the court disagrees with the plaintiffs' argument that *res ipsa loquitur* applies.

The defendants are entitled to judgment as a matter of law on Count VII of the complaint.

E. Abormally Dangerous Activity

Detrex claims entitlement to summary judgment on the plaintiffs' claim that Detrex is strictly liable for dam-

ages because its delivery of TCE constituted an "abnormally dangerous activity." [6] Under Indiana law, a party who carries on an abnormally dangerous activity is strictly liable for the harm resulting from the activity even though that party may have exercised the utmost care to prevent the harm. *Bridges v. Kentucky Stone Co.*, 425 N.E.2d 125 (Ind.1981); Restatement (Second) of Torts § 519 (1977). The factors considered in determining whether an activity is abnormally dangerous are:

> (a) existence of a high degree of risk of some harm to the person, land or chattel of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous activities.

Restatement (Second) of Torts § 520 (1977). The inquiry is not on the hazardous substance's dangerous propensities, but on the defendant's activity with regard to the substance. *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1181 (7th Cir.1990); *Erbrich Products Co., Inc. v. Wills*, 509 N.E.2d 850, 857 (Ind.App.1987). The activity at issue here is Detrex's transportation of TCE.

The Restatement's first and second factors favor the plaintiffs. The handling of TCE involves a high degree

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[6] The plaintiffs claimed in Count VIII that Detrex was engaged in an "ultrahazardous activity". However, the parties now agree that the modern term is "abnormally dangerous activity".

of risk to persons and land, and it is likely that the harm that results from the release of TCE would be great. The third factor, however, favors Detrex: it appears from the Detrex drivers' descriptions of their techniques that the exercise of reasonable care can eliminate the risk of TCE release.

In *Smith v. Kauffman*, 174 Ind.App. 222, 366 N.E.2d 1195, 1199 (1977), a wrongful death action resulting from a gasoline explosion, the court rejected the plaintiff's proposed jury instruction that the refueling of a crane as an extra-hazardous activity. The Court of Appeals affirmed, stating that "where the doing of a task is safe when properly executed it is not intrinsically dangerous and absolute liability does not attach. . . . Since the filling of a gasoline tank is not an extra-hazardous activity in and of itself the giving of appellant's Instruction No. 7 would have drawn upon an incorrect theory of the law." Similarly, in this case, the pumping of a dangerous fuel, when properly done, is not so intrinsically dangerous that absolute liability must attach.

The fourth factor also favors Detrex: although TCE is not a common household fuel, it is an industrial solvent, and pumping it from one tank into another is not unusual.

Finally, the fifth and sixth factors support Detrex. EPC found TCE to be a very useful solvent and used it for many years. *See City of Bloomington v. Westinghouse Electric Corp.*, 891 F.2d 611, 615-16 (7th Cir. 1989). EPC also had it delivered to its storage tanks and drew it from the tanks to use it. Therefore, EPC determined where the activity of delivering TCE would be conducted. EPC cannot claim that the value of delivery TCE is outweighed by its danger to the community. The plaintiffs note that the locality of Elkhart's drinking water must be taken into account, but EPC determined where to locate its plant and directed its suppliers to deliver solvents there.

For these reasons, summary judgment must be granted in Detrex's favor on Count VIII.

F. Conceded Claims

Detrex also sought summary judgment as to the nuisance claim in Count IX and the indemnity claim in Count XIII. The plaintiffs withdrew their nuisance and indemnity claims, and the court therefore grants summary judgment on Counts IX and XIII.

G. Punitive Damages

Detrex claims that the plaintiffs are not entitled to punitive damages. As Detrex notes, Indiana requires plaintiffs to establish "by clear and convincing evidence, all of the facts that are relied upon . . . to support . . . recovery of punitive damages." IND.CODE 34-4-34-1; *Orkin Exterminating Co., Inc. v. Traina*, 486 N.E.2d 1019, 1022 (Ind.1986) (punitive damages are penal in nature and therefore require a higher standard of proof than the preponderance of the evidence standard). The plaintiff must show by clear and convincing evidence "that the defendant acted with malice, fraud, gross negligence, or oppression which was not the result of mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other human failing." *Lazarus Dept. Store v. Sutherlin*, 544 N.E.2d 513, 527 (Ind.App. 1989). Detrex submits that the plaintiffs cannot show such evidence.

The plaintiffs claim that the issue of punitive damages is unsuited for disposition by summary judgment, citing *Spangler v. Sears, Roebuck & Co.*, 752 F.Supp. 1437, 1447 (S.D.Ind.1990) ("because punitive damages issues are typically matters of 'degree' they are uniquely unsuited for disposition by pretrial motion."). The plaintiffs also cite *Werlein v. United States*, 746 F.Supp. 887, 907 (D.Minn.1990), in which the court states that, " 'Summary judgment is available in punitive damage

cases. The standard for obtaining summary judgment, however, is an onerous one, and a summary judgment disposing of such claims will rarely be granted.' " (quoting Alsop and Herr, *Punitive Damages in Minnesota Products Liability Cases: A Judicial Perspective,* 11 Wm. Mitchell L.Rev. 319, 326-27 (1985)).

Citing *Reed v. Ford Motor Co.,* 679 F.Supp. 873, 878 (S.D.Ind.1988), the plaintiffs further argue that the court cannot stand in the shoes of the trier of fact when making a determination of a summary judgment motion. *Reed* recognized that the court "at the summary judgment stage will . . . not have the benefit of all the evidence the jurors will actually hear in the context they will hear it. . . . the court cannot make value judgments that could arise over what constitutes iniquitous . . . conduct." 679 F.Supp. at 877. However, the *Reed* court also recognized that "this question is not always within the sole province of the jury, because there is certain conduct, such as that described in *Orkin* [*Exterminating Co., Inc. v. Traina*], 486 N.E.2d 1019, 1024 (Ind.1986), which cannot reasonably be said to constitute more than mere negligence." 679 F.Supp. at 877, n. 3. In *Orkin,* the court found as a matter of law that the evidence was insufficient to support an award of punitive damages. 486 N.E.2d at 1024.

The plaintiffs have presented evidence that there were numerous spills of TCE upon delivery during the time that Detrex was EPC's sole supplier of TCE. This, the plaintiffs argue, is evidence of Detrex's obdurate conduct, which would support an award of punitive damages. The court cannot conclude at this stage that there is no evidence from which reasonable jurors could find, by a clear and convincing standard, that punitive damages should be awarded. *See Spearman v. Delco Remy Div. of General Motors Corp.,* 717 F.Supp. 1351, 1361 (S.D.Ind.1989). Therefore, the court declines to grant summary judgment as to the plaintiffs' claim for punitive damages.

VI. ORDER

For the foregoing reasons, the court hereby:

A. GRANTS IN PART and DENIES IN PART Detrex's first motion to strike, as set forth in Parts III-A and III-C of this memorandum.

B. DENIES Detrex's second motion to strike.

C. GRANTS IN PART the plaintiffs' motion for partrial summary judgment. The plaintiffs are granted judgment as a matter of law on the issue of Detrex's liability on Count I of the complaint insofar as Count I is based on the "open-valve spill" and "delivery spills" during deliveries by Detrex drivers. The plaintiffs' motion for partial summary judgment on Count I is denied in all other respects.

D. GRANTS IN PART the defendant's motion for summary judgment. The motion is granted, and Detrex is entitled to judgment as a matter of law, with respect to the following:

1. As to Count I, insofar as Count I relies on the alleged overflow spill or delivery spills by Transport drivers;

2. As to Count II, insofar as Count II is based on the alleged overfill spill;

3. As to Count IV;

4. As to Count V;

5. As to Count VII;

6. As to Count VIII;

7. As to Count IX; and

8. As to Count XIII.

E. Detrex's motion for summary judgment is DENIED in all other respects.

SO ORDERED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No.

DETREX CORPORATION,
Petitioner,

v.

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the bulk delivery of useful hazardous substances by Petitioner in tanker trucks to Respondents' manufacturing plant falls within the scope of the exception to the definition of "facility" which excludes consumer products in consumer use or in vessels found in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601 through 9675?

2. Is a cost recovery lawsuit by a potentially responsible party against other liable parties under 42 U.S.C.A. § 9607(a) of the Comprehensive Environmental Response, Compensation and Liability Act an action for contribution requiring district courts to equitably apportion responsibility among the litigants after strict and joint and several liability is imposed?

CERTIFICATE OF SERVICE

I certify that three copies of this Petition for Writ of Certiorari were mailed pursuant to Supreme Court Rule 29.3 by United States mail, first class postage, prepaid this 5th day of November, 1993, to:

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STATUTE INVOLVED

42 U.S.C. § 9613 (g) Period in which action may be brought

* * * *

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

* * * *

SUPREME COURT, U.S.
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CLERK

No. 94-1658

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Petitioners,

v.

DETREX CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER QUESTION PRESENTED FOR REVIEW

Whether the application of this Court's controlling decision in *Key Tronic Corp. v. United States,* 511 U.S. ——, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), which was decided while this non-final case was on appeal, violated the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 through 9675 or the common law doctrine of collateral estoppel where Respondent had not exhausted its appellate remedies concerning the quantification of attorneys fees?

THE PARTIES

Respondent, Detrex Corporation, is a Michigan corporation. Detrex Corporation owns 100% of The Elco Corporation, an Ohio corporation, which in turn owns 85% of Harvel Plastics, Inc., a Pennsylvania corporation.

TABLE OF CONTENTS

	Page
COUNTER QUESTION PRESENTED FOR REVIEW	i
THE PARTIES	ii
TABLE OF AUTHORITIES	iv
COUNTER STATEMENT OF THE CASE	1
INTRODUCTION	1
1. Recent Procedural History of the Case and the *Key Tronic* Decision	2
2. The Decisions of the Seventh Circuit	4
REASONS FOR DENYING THE WRIT	7
I. PETITIONERS HAVE FAILED TO DEMONSTRATE WHY THE PETITION FOR WRIT SHOULD BE GRANTED	7
II. THIS CASE DOES NOT MERIT THE COURT'S REVIEW	8
III. THE DECISION OF THE SEVENTH CIRCUIT IS CORRECT	9
A. Petitioners Have Misconstrued § 9613(g)(2) of CERCLA	9
B. Neither Collateral Estoppel Nor Procedural Requirements Barred the Application of *Key Tronic* to Detrex's Appeal	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

Detrex Corp. v. Amcast Indus. Corp., 2 F.3d 746 (7th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 691, 126 L.Ed.2d 658 (1994) ..... *passim*

Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993) .. 13

Harper v. Virginia Dept. of Taxation, —— U.S. ——, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993) 12, 13

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) 12, 13

Key Tronic Corp. v. United States, 511 U.S. ——, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994) ..... *passim*

Livingston v. Donahey, —— U.S. ——, 114 S.Ct. 2668, 129 L.Ed.2d 805 (1994) 13

STATUTES:

42 U.S.C. § 9607 3

42 U.S.C. § 9613(g)(2) 6-11

42 U.S.C. §§ 9601-9675 ..... *passim*

OTHER AUTHORITY:

Rule 10 of the United States Supreme Court Rules.. 8

IN THE

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OCTOBER TERM, 1994

No. 94-1658

AMCAST INDUSTRIAL CORPORATION and
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Petitioners,

v.

DETREX CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

INTRODUCTION

There are no special or important reasons for granting Petitioners' request for writ of certiorari. The issues presented do not involve a conflict of authority in the lower courts. The decision below was based upon a narrow set of procedural facts unlikely to significantly impact future litigation.

Moreover, the decision of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") was correct. After this case was remanded to the District Court, two new, final judgments were entered which quantified an award of attorneys fees for the first time. Respondent, Detrex Corporation ("Detrex"), appealed from these two new decisions as of right. During the

pendency of Detrex's appeal, this Court decided *Key Tronic Corp. v. United States*, 511 U.S. ——, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994). Thus, there was no preclusive doctrine which warranted refusing to apply *Key Tronic* to the then pending appeal. There was no final judgment on which to base collateral estoppel. The Seventh Circuit also correctly concluded that in the absence of a final judgment, its test for applying collateral estoppel under limited circumstances was not satisfied. The petition for writ of certiorari should be denied.

1. Recent Procedural History of the Case and the *Key Tronic* Decision.

This is the second time that this lawsuit has been brought before this Court. Earlier, Detrex filed a petition for a writ of certiorari based upon a decision of the Seventh Circuit which affirmed in part, reversed in part, and remanded for further proceedings ("first opinion"). Petitioners' Petition for Writ of Certiorari ("Petition for Writ") at 39a-48a. The first opinion confirmed Detrex's liability under one section of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 through 9675 ("CERCLA"), however, it was silent with respect to the attorneys fees issue. Detrex's petition for writ of certiorari was denied. See 114 S.Ct. 691 (1994).

The case then returned to the District Court following issuance of the mandate by the Seventh Circuit on January 24, 1994. The litigants filed motions in the District Court evidencing their different interpretations of the mandate of the Seventh Circuit. Petitioners filed a motion to technically amend the District Court's prior judgment. Detrex filed a more comprehensive motion which was styled "Motion for Determination of Further Proceedings Ordered by the Seventh Circuit, For a Stay, For Reconsideration of its Motion for Consolidation, and Reply Brief in Opposition to Plaintiffs' Request to Tech-

nically Amend the Judgment." The District Court addressed these two motions in a Memorandum and Order dated March 28, 1994. Respondent's Appendix at 1a-7a. Petitioners' motion was granted by the District Court. Based upon the mandate of the Seventh Circuit, a new and amended judgment was entered on April 4, 1994, which awarded Petitioners response costs including attorneys fees and litigation expenses. Respondent's Appendix at 8a-9a. With respect to the attorneys fees issue, the District Court advised that "[s]hould the Supreme Court disagree with this court's holding, Detrex can move at that time for the appropriate relief." Respondent's Appendix at 5a.

In response to the District Court's judgment awarding them attorneys fees, the Petitioners filed an Application for Attorneys Fees, Litigation Expenses, and Pre-Judgment Interest. On March 30, 1994, the District Court entered a second Memorandum and Order which, for the first time, quantified the attorneys fees and litigation expenses that Petitioners were entitled to receive. Petition for Writ at 10a-36a. A final judgment was entered on March 31, 1994, awarding Petitioners $554,494.71 in attorneys fees and litigation expenses. Petition for Writ at 35a.

It was these two new judgments which Detrex appealed to the Seventh Circuit. Detrex filed its Notice of Appeal on May 2, 1994, with respect to both the March 31, 1994, and April 4, 1994, judgments. The argument made by Detrex on appeal was that the judgments were in error to the extent that they awarded and quantified attorneys fees and litigation expenses.

Approximately one month later, while Detrex's appeal was pending, on June 6, 1994, this Court decided *Key Tronic*. In *Key Tronic*, this Court held that § 9607 of CERCLA does not generally permit the recovery of attorneys fees and litigation expenses. Certain limited clas-

sifications of attorneys fees, however, are recompensable to private litigants under CERCLA. For example, attorneys fees closely tied to "the actual cleanup" may be recovered. *Key Tronic*, 128 L.Ed.2d at 807. This controlling decision, issued during the pendency of Detrex's appeal, rendered the judgments of the District Court incorrect.

Petitioners also filed a Supplemental Application for Attorneys Fees, Litigation Expenses, Pre-Judgment Interest, and Additional Response Costs. On June 15, 1994, the District Court entered two Memoranda and Orders addressing Petitioners' application for recovery of more attorneys fees and prejudgment interest. The District Court denied the motions of the Petitioners based upon the rule of law created by the *Key Tronic* decision. Respondent's Appendix at 10a-12a. Thus, both the District Court and the Seventh Circuit have applied this Court's decision in *Key Tronic* to this case and denied Petitioners' repeated attempts to recover attorneys fees.

2. The Decisions of the Seventh Circuit.

The Seventh Circuit has twice confirmed that *Key Tronic* is controlling in this litigation. While Detrex's appeal was pending, but before it had been briefed, Petitioners filed a Motion to Dismiss this Appeal on Issues Concerning the National Contingency Plan and Recovery of Attorney Fees, Litigation Expenses, and Indirect Expenses as Response Costs. The Seventh Circuit decided Petitioners' motion in an Order dated August 5, 1994. Petition for Writ at 37a-38a. Concerning the attorneys fees issue, the Seventh Circuit held that "an intervening Supreme Court decision has strengthened Detrex's argument that it is not liable for attorneys' fees . . .". *Id.* at 38a. Thus, Detrex's appeal was allowed to continue based upon the Seventh Circuit's holding that *Key Tronic* was applicable to this litigation.

After briefing was completed, and without oral argument, the Seventh Circuit issued its opinion on January 10, 1995. Petition for Writ at 1a-9a. Detrex's appeal was granted and the District Court's judgments awarding and quantifying attorneys fees were reversed. *Id.* at 9a. Also, Detrex was awarded its costs incurred in connection with successfully prosecuting the appeal.

The core argument raised by Petitioners in their petition for writ of certiorari was also raised below and succinctly summarized by the Seventh Circuit, *i.e.*, "[Petitioners] ask us to hold that when we affirmed the relevant portions of the declaratory judgment, and the Supreme Court denied certiorari, the judgment became 'final' for purposes of res judicata." *Id.* at 2a. In framing its opinion, the Seventh Circuit reached some preliminary conclusions. It described Petitioners' argument concerning this Court's denial of Detrex's petition for a writ of certiorari as "a red herring." *Id.* at 3a. The Seventh Circuit also concluded that Petitioners argued for the application of "collateral estoppel rather than res judicata . . .". *Id.* at 4a-5a.

The majority of the Seventh Circuit's opinion concerned the issue as to whether there was a final judgment to permit the application of the doctrine of collateral estoppel. Additionally, the related issue was whether the absence of such finality could be overlooked based upon authority which applied collateral estoppel even without a final judgment. The Seventh Circuit answered both of these questions negatively and held that collateral estoppel was inapplicable.

With respect to the first issue, it was held by the Seventh Circuit that there was no final judgment. The Seventh Circuit explained that its mandate resulted in a "new, final judgment from which Detrex could have appealed and in fact did appeal." Petition for Writ at 6a. Declaratory judgments which award attorneys fees in un-

determined amounts, according to the Seventh Circuit, should likely not be treated as final and appealable. *Id* at 6a. Stated differently, there was no final judgment for collateral estoppel purposes because the order awarding attorneys fees to Petitioners was non-final until the amount of fees was determined and ordered paid. The appellate court wrote that that circumstance did not happen until March of 1994. *Id.* After careful consideration, the Seventh Circuit held that "there was no final judgment." *Id.* at 7a.

The Seventh Circuit then analyzed whether, notwithstanding the fact that there was no final judgment, collateral estoppel should be applied to Detrex's appeal. It was held that the preclusive doctrine was inapplicable because Detrex had not exhausted its appellate remedies. Detrex, according to the Seventh Circuit, could have requested and obtained relief from the non-final decision of the appellate court, *i.e.*, the first opinion. *Id.* This Court's policy of applying "new decisions to all cases that were not yet final when the new decision came down" was cited to by the Seventh Circuit. *Id.* at 7a-8a. The Seventh Circuit held that collateral estoppel should not be used to deprive Detrex of its full appellate remedies. In conclusion, the appellate court wrote:

> "[u]ntil our ruling on the scope of response costs became final, Detrex was entitled to pursue its appellate remedies, and hence to obtain the benefit of a favorable decision by the Supreme Court rendered before the pursuit was complete." *Id.* at 9a.

The thoughtful opinion by Chief Judge Posner considered and rejected the same arguments raised in the Petition for Writ. The Seventh Circuit did not erroneously ignore the position of Petitioners concerning 42 U.S.C. § 9613(g)(2). Petition for Writ at 6. Paraphrasing from the Seventh Circuit's August 5, 1994, order: it is true that the Seventh Circuit's opinion does not expressly mention 42 U.S.C. § 9613(g)(2), however, in upholding Detrex's appeal, it necessarily rejected every ground on which Petitioners opposed that appeal. Petition for Writ at 38a.

The Petitioners complain that it would be "unfair" to deny them recovery of attorneys fees. There is nothing "unfair" about denying Petitioners attorneys fees because this Court held that such costs are not recoverable under CERCLA.

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE FAILED TO DEMONSTRATE WHY THE PETITION FOR WRIT SHOULD BE GRANTED.

A petition for writ of certiorari should explain to this Court the important reasons why review should be granted. Petitioners fail to make the required showing. They attempt to argue that this case presents an important question of federal statutory law. The decision of the Seventh Circuit, according to Petitioners, renders meaningless a "key" provision of CERCLA. Petition for Writ at 9-10. Also, Petitioners urge that the Seventh Circuit "misapplied" United States Supreme Court precedent. Petition for Writ at 10. No other reasons are offered in support of the Petition for Writ. The balance of the Petition for Writ makes the same legal arguments which were considered and rejected by the Seventh Circuit.

The Petition for Writ makes two legal arguments. Petitioners argue that § 9613(g)(2) of CERCLA makes the declaratory judgment concerning attorneys fees binding because there was an earlier appeal by Detrex. CERCLA, according to the Petitioners, "precludes a defendant found liable for response costs from relitigating the plaintiff's entitlement to recover [them] in subsequent proceedings brought to recover further response costs." Petition for Writ at 12. This position ignores the unique procedural facts of this litigation.

Additionally, Petitioners assert that *Key Tronic* cannot be applied to this case because *res judicata* applies. Petition for Writ at 16-17. The Seventh Circuit erred, according to the Petitioners, because the magical declaratory

judgment is *res judicata* or collateral estoppel, which negates the application of *Key Tronic*.

II. THIS CASE DOES NOT MERIT THE COURT'S REVIEW.

Rule 10 of the United States Supreme Court Rules explains the reasons why petitions for writ will be granted. There must be "special and important reasons therefore." Such special and important reasons include a conflict among the United States courts of appeals or an important question of federal law.

No such special and important reasons exist in this case. The Petitioners have not alleged a circuit court conflict concerning any issue. There is none. Nor is there an important question of federal law. This case is unique because of its procedural posture. If allowed to stand, the decisions of the Seventh Circuit will very likely have little impact upon future litigants. These unique procedural factors include a denial of Detrex's petition for writ of certiorari, remand back to the District Court, the intervening *Key Tronic* decision, the issuance of new judgments by the trial court, and subsequent appeal to the Seventh Circuit. Based upon Detrex's right to obtain relief under *Key Tronic* and the particular status of the litigation, the Seventh Circuit held that collateral estoppel was inapplicable. This hardly seems the type of case with far reaching impact that deserves employment of the scarce judicial resources of this Court.

If the CERCLA provision at issue was so "key", it can be assumed with some confidence that there would be a body of law interpreting it which the Petitioners surely would have cited to in their Petition for Writ. The reality is that the Petition for Writ is important to only the Petitioners in their attempt to recover attorneys fees despite law to the contrary from this Court and the Seventh Circuit. In any event, § 9613(g)(2) of CERCLA could also soon be amended by Congress.

III. THE DECISION OF THE SEVENTH CIRCUIT IS CORRECT.

A. Petitioners Have Misconstrued § 9613(g)(2) of CERCLA.

Detrex agrees that 42 U.S.C. § 9613(g)(2) is not ambiguous. This section of the statute does not, however, lead to the absurd result urged by Petitioners. Essentially, the Petitioners argue that, once a declaratory judgment issues, it is binding in *all* circumstances, for all issues in all cases, and without regard to subsequent procedural developments such as those in this case. The Petitioners' position is untenable. If, for example: a declaratory judgment were issued against a litigant with respect to its liability under CERCLA, such as happened in this lawsuit to Detrex; the liability issue is then lost in an interlocutory appeal; and later, in the same action, further facts were developed which established that the same litigant was not liable under CERCLA during the damages phase of the litigation. The Petitioners' interpretation of the statute would not allow for the declaratory judgment to be corrected to comport with the facts. Such a result could not have been intended by Congress.

Also, the argument of Petitioners ignores the facts of this case. The assertion of the Petitioners is that once this Court denied Detrex's petition for a writ of certiorari, "appellate review of the declaratory judgment . . . ended". Petition for Writ at 5. The Petitioners, however, conveniently fail to mention the relevant procedural history after the first opinion was issued by the Seventh Circuit. After denial of Detrex's petition for a writ of certiorari, the mandate of the Seventh Circuit issued and the case was once again within the jurisdiction of the District Court. The parties filed motions. The District Court issued two new judgments both of which concerned attorneys fees. The amount of attorneys fees were quantified for the first time and ordered to be paid. New orders

were also issued which denied Petitioners' requests for additional attorneys fees and interest based upon the *Key Tronic* decision. Respondent's Appendix at 10a-12a.

The Seventh Circuit correctly rejected the position of the Petitioners. Detrex could have, and did, appeal the new, final judgments as of right. Petition for Writ at 6a. After careful analysis, the appellate court concluded that its earlier opinion was not final with respect to the attorneys fees issue. Nor was there any decision "final enough" to justify the application of collateral estoppel because Detrex had not exhausted its appellate remedies.

The Petitioners misinterpret § 9613(g)(2) of CERCLA arguing that it means "once an entitlement to response costs or damages is established, that determination is binding in all future actions to recover further response costs or damages." Petition for Writ at 11. The statute, on its face, has a different meaning. Section 9613(g)(2) states that a declaratory judgment shall be entered "on liability." Thus, with respect to the issue of liability under CERCLA, the declaratory judgment is binding in subsequent actions. The statute does not compel the result argued for by Petitioners that the *amount or categories* of response costs are fixed for all time. The last phrase of this provision supports this interpretation because it refers to "*subsequent action or actions* to recover *further* response costs or damages." 42 U.S.C. § 9613(g)(2) (emphasis added). This section has application to the issue of liability in a subsequent action, not the same lawsuit. The use of the word "further" by Congress is also instructive. Clearly, Congress was addressing a situation where a second or third lawsuit had been filed seeking additional or "further" response costs. In such a second or third lawsuit, an earlier declaratory judgment on liability would be binding.

That is how Congress intended for this provision to be applied. The judgment declaring that a party is liable

under CERCLA has prospective application; however, nothing on the face of the statute dictates that amounts or categories of response costs are binding in subsequent actions. Congress did not mean to prevent the application of controlling authority to a pending appeal. Petitioners' suggestion to the contrary is wrong.

The Petitioners' initially argue that § 9613(g)(2) is unambiguous. In the same breath, however, they urge the Court to consider the provision's legislative history. Detrex suggests that the Petitioners are grasping at straws because of the weakness of their arguments.

Nonetheless, a review of the legislative history confirms that Detrex's interpretation of § 9613(g)(2) is correct and not that of the Petitioners. The legislative history cited to by Petitioners does not expressly or implicitly negate application of *Key Tronic* to this case. The Petitioners agree that the legislative history contemplates multiple lawsuits. Petition for Writ at 13. They also concur that the initial declaratory judgment on liability will be binding in those subsequent cases. *Id.* Their analysis, however, stops there. The legislative history supports only the conclusion that judgments be declared on liability under CERCLA for purposes of future litigation. The legislative history of CERCLA contains this language which supports Detrex's interpretation of § 9613(g)(2):

> "[i]n the initial cost recovery action, in order to conserve judicial time and resources, the court is to enter a declaratory judgment on liability for response costs; this judgment will be binding in future cost recovery actions to obtain additional costs." SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. PRT. 101-120, Vol. 5, 101st Cong., 2d Sess. 4058 (1990).

The interpretation of the legislative history suggested by Petitioners is also not consistent with CERCLA litigation. Litigation under CERCLA usually proceeds in

two distinct phases, *i.e.*, liability and damages. In the initial phase, the liability of the litigants under CERCLA is determined. Trial courts assess whether the defendants are liable under CERCLA's strict liability scheme. It is that declaration of liability which Congress intended to have application in subsequent actions without regard for the actual amount or categories of response costs.

A major flaw in Petitioners' position is that the amount of Detrex's liability for attorneys fees was not fixed until March of 1994. The declaratory judgment concerning attorneys fees was not final until that quantification was made and payment ordered. See Petition for Writ at 6a. Detrex appealed after the attorneys fees were quantified and, during the pendency of that appeal, the *Key Tronic* decision was issued. Thus, the Seventh Circuit was correct in applying the controlling decision to Detrex's appeal. The Seventh Circuit did not ignore the District Court's declaration of liability under CERCLA. It merely applied *Key Tronic* to Detrex's appeal which was based upon new, final judgments that quantified attorneys fees for the first time. One category of response costs was removed from Petitioners' damages and the declaration of liability was not negated by the Seventh Circuit.

B. Neither Collateral Estoppel Nor Procedural Requirements Barred the Application of *Key Tronic* to Detrex's Appeal.

The Petitioners assert that the Seventh Circuit erred by applying *Key Tronic* "retroactively." This argument can be quickly dispatched. This Court's decisions in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S.Ct. 2439, 2445 (1991) and *Harper v. Virginia Dept. of Taxation*, —— U.S. ——, 113 S.Ct. 2510, 2517 (1993) are cited by Petitioners in support of their argument. Under the authority of those cases, however, new decisions of the Court are applied retroactively *unless* procedural requirements or *res judicata* prevent such ap-

plication. The *Key Tronic* decision was properly applied to Detrex's pending appeal by the Seventh Circuit.

The issue is whether there are any procedural requirements or *res judicata* considerations which bar the application of *Key Tronic*. There are none. As explained by the Seventh Circuit, there was no final judgment upon which to base collateral estoppel because Detrex appealed from two new final judgments. Nor was there any judgment "final enough" to justify the application of collateral estoppel because Detrex had not exhausted its appellate remedies. Thus, the exception to the general rule of retroactive application is inapplicable.

The Seventh Circuit explained that its first opinion (Petition for Writ at 39a-48a) was non-final "in the eyes of the Supreme Court." Petition for Writ at 7a. Detrex could have sought and obtained relief directly from this Court with respect to the non-final portion of the Seventh Circuit's first opinion. *Id.* Interestingly, the Seventh Circuit cites to the *Harper* decision in this regard which is also relied upon by the Petitioners.

The correctness of the Seventh Circuit's decision on this issue is confirmed by a recent order of this Court. In *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993), the trial court refused to award attorneys fees based upon the American Rule. The United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") reversed on this issue and "remanded for determination of what constitutes reasonable attorneys fees recoverable under CERCLA." *Id.* at 1256. On June 13, 1994, this Court granted the petition for writ of certiorari in the *Donahey* case. *Livingston v. Donahey*, 114 S.Ct. 2668, 129 L.Ed.2d 805 (1994). The judgment of the Sixth Circuit was vacated and the case was remanded by this Court for further consideration in light of *Key Tronic*. The Seventh Circuit correctly held that Detrex was entitled to relief based upon *Key Tronic*. The arguments of Petitioners are unpersuasive and contrary to well established authority.

CONCLUSION

The Petitioners' Petition for Writ should be denied. This case does not merit consideration by the Court. The narrow decision of the Seventh Circuit was correct because Detrex was entitled to have *Key Tronic* applied to its appeal.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S88-620M

AMCAST INDUSTRIAL CORPORATION, *et al.*,
Plaintiffs

VS.

DETREX CORPORATION, *et al.*,
Defendants

MEMORANDUM AND ORDER

This cause comes before the court on the motions of Detrex Corporation for a determination of further proceedings, for a stay of the plaintiffs' pending motion for attorney fees, for reconsideration of Detrex's motion for consolidation, and for oral argument. Also before the court are the motions of Amcast Industrial Corporation and Elkhart Products Corporation (collectively referred to as "Amcast") to technically amend the judgment in accordance with the court of appeals' mandate, and to enforce the supersedeas bond. The court assumes familiarity with this case's facts and procedural history,[1] and finds that it can adequately address the foregoing motions based upon the parties' written submissions. Accordingly, the court denies Detrex's motion for oral argument. For

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[1] *See Amcast Industrial Corp. v. Detrex Corp.*, 779 F. Supp. 1519, 1536-39 (N.D. Ind. 1991), *further proceedings*, 822 F. Supp. 545 (N.D. Ind. 1992), *aff'd in part, rev'd in part, remanded*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994).

the reasons that follow, the court finds that Detrex's motions must be denied, and Amcast's motions must be granted.

I.

Amcast contends that the only portion of this court's opinion and judgment which the Seventh Circuit reversed was this court's finding that Detrex was liable as an arranger pursuant to Count II of Amcast's complaint. Thus, Amcast maintains that the court need only make a technical adjustment to the judgment removing Count II as a basis for liability.

Detrex contends that the Seventh Circuit's decision "compels a trial to determine how much trichloroethylene ("TCE") contamination was actually caused by Detrex and Transport Service Company." Detrex bases its argument on the Seventh Circuit's conclusory sentence that Detrex is liable for the TCE spillage from its own truck, but not the spillage from Transport Service's trucks. *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d at 751. Thus, Detrex maintains that the Seventh Circuit's opinion requires that a trial be held to make a factual determination regarding the total amount of TCE spilled during all deliveries at the site, and the amount of TCE spilled that is attributable to Amcast, Detrex, and Transport. Detrex also claims that because Transport is not a party to this action, the court should reconsider Detrex's motion to consolidate this case with *Detrex Corp. v. Amcast Industrial Corp., et al.*, Cause No. S92-663M (*"Amcast II"*).

Detrex's argument misses the crux of the Seventh Circuit's discussion of apportionment. The appellate court held that because of Detrex's own litigation strategy—failing to file a timely counterclaim or third-party claim for contribution—any apportionment of liability or response costs now must occur in the separate contribution action filed by Detrex, not in this case:

A potentially responsible person who, like Detrex, has been sued is entitled to seek, by way of counterclaim, contribution from the plaintiff for the amount of response costs fairly attributable to the conduct of the plaintiff as distinct from that of the defendant. Rather than file a counterclaim against Elkhart, Detrex argued to the district judge that in the course of adjudicating Elkhart's claim he had to apportion responsibility for the costs between the parties. The judge rejected this argument, together with Detrex's more fundamental argument that it is not a responsible person within the meaning of the statute, and entered judgment in favor of Elkhart for the entire response costs that Elkhart had incurred. Eventually Detrex filed a separate action for contribution from Elkhart; that suit is pending in the district court.

* * *

The argument that the judge had to apportion liability between Detrex and Elkhart in Elkhart's suit makes no sense, so we dispatch it at the outset. The statute is clear that whoever (like Elkhart) incurs costs in cleaning up a contaminated site can seek to recover them from any responsible person, and if the responsible person believes as Detrex does that his contribution to the mess was trivial and wants the point established promptly he can counterclaim for as large a percentage of the costs as he thinks he can prove was due to the plaintiff's own conduct. The counterclaim if promptly filed will doubtless be tried at the same time as the main claim, so the defendant will at no time be out of pocket by more than the share of the response costs attributable to his own conduct. Obviously Detrex could have counterclaimed without giving up its main argument—that it is not a responsible person and therefore is not liable for any part of the response costs. We do not know why it waited and filed a separate suit.

Amcast Industrial Corp. v. Detrex Corp., 2 F.3d at 748-49. There is no indication that Seventh Circuit remanded the case for a trial to apportion costs between Amcast, Detrex, and Transport.[2]

Accordingly, Detrex's motions for determination of further proceedings ordered by the Seventh Circuit, and for reconsideration of its motion for consolidation, must be denied.

II.

Detrex also claims that because the Seventh Circuit did not address one of its arguments on appeal—that Amcast failed to comply with the National Contingency Plan ("NCP")—this court should certify that issue back to the Seventh Circuit. Detrex cites no authority for the proposition that this court can, in essence, tell the court of appeals how to do its job.[3] Rule 40 of the Federal Rules of Appellate Procedure affords a party fourteen days within which to file a petition for rehearing, and to "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked."

Further, compliance with the NCP is a necessary prerequisite to the imposition of liability; the Seventh Circuit could not have upheld this court's decision that Detrex was liable for response costs connected with the

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[2] Had the Seventh Circuit wanted this court to conduct a trial to apportion response costs between Amcast, Detrex, and Transport, it could have stated so directly, it could have held that this court abused its discretion in not allowing Detrex to file its contribution counterclaim, or it could have indicated (in dicta) that the instant case should be consolidated with Detrex's contribution action which is pending before this court. Instead, the court explained that "[Detrex's] argument that the judge had to apportion liability between Detrex and Elkhart in Elkhart's suit makes no sense." *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d at 748.

[3] Detrex cites 28 U.S.C. § 1291, which applies to final judgments, and 28 U.S.C. § 1292, which applies to interlocutory appeals. The relief Detrex seeks, however, is not from a final judgment or interlocutory order. Thus, neither statute is controlling.

spillage from its trucks without also determining that Amcast complied with the NCP.

Accordingly, Detrex's request that this court certify the case back to the court of appeals must be denied.

III.

Detrex next contends that Amcast's pending motion for attorney fees should be stayed in light of *Key Tronic Corp. v. United States*, 984 F.2d 1025 (9th Cir.), *cert. granted*, 114 S. Ct. 633 (1993). The issue before the Court in that case is whether attorney fees constitute recoverable response costs in a private cost recovery action under CERCLA. This court already held that such fees are recoverable, and currently faces the task of quantifying the amount of reasonable fees that Amcast should recover. Should the Supreme Court disagree with this court's holding, Detrex can move at that time for the appropriate relief.

Accordingly, the court must deny Detrex's motion to stay Amcast's pending motion for attorney fees.

IV.

Amcast contends that in response to the Seventh Circuit's decision and mandate, this court need only technically amend the judgment and remove Count II as a basis of liability. The court agrees. The Seventh Circuit disagreed with this court's opinion and judgment concerning Detrex's "arranger" liability (Count II), *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d at 751, but held that Detrex remained liable for the spillage of TCE from its own trucks (Count I). *Id.* Accordingly, pursuant to the mandate and decision of the United States Court of Appeals for the Seventh Circuit, the court must grant Amcast's motion to technically amend the judgment.

V.

Pursuant to Rule 62(d) of the Federal Rules of Civil Procedure, Detrex posted a $1.5 million supersedeas bond pending appeal; the court approved the bond. Amcast moves to enforce the supersedeas bond and to have the proceeds distributed in satisfaction of the judgment with post-judgment interest. Detrex does not dispute that the supersedeas bond is enforceable, but contends that the amount of liability is not fixed. Detrex claims that the supersedeas bond cannot be enforced until the court decides Detrex's motion for determination of further proceedings. For the reasons stated previously, Detrex's motion for determination of further proceedings must be denied; thus, the amount of Detrex's liability is fixed. Accordingly, Amcast's motion to enforce the supersedeas bond must be granted.

VI.

In conclusion, the court:

(1) DENIES the defendant's motion for oral argument (filed January 31, 1994 (#396));

(2) DENIES the defendant's motion for determination of further proceedings ordered by the Seventh Circuit (filed January 31, 1994 (#397));

(3) DENIES the defendant's motion for reconsideration of its motion for consolidation (filed January 31, 1994 (#397));

(4) DENIES the defendant's request that this court certify the case back to the court of appeals (filed January 31, 1994 (#397));

(5) DENIES the defendant's motion for a stay of the plaintiffs' motion for attorney fees (filed January 31, 1994 (#397));

(6) GRANTS the plaintiffs' motion to amend the judgment (filed January 24, 1994 (#393)), and in connection therewith, the clerk is ORDERED to enter judgment as follows:

IT IS ORDERED AND ADJUDGED that previously, on November 18, 1991, partial summary judgment was granted to plaintiffs and to defendants. In light of the that decision, as well as the decision reported at 822 F. Supp. 545 (N.D. Ind. 1992), and the decision and mandate of the United States Court of Appeals for the Seventh Circuit, *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994), judgment is entered herein accordingly. Judgment is entered for the plaintiff on Count I of the plaintiffs' complaint in the amount of $1,197,082.42 as response costs incurred as of November 22, 1991, plus attorney fees, litigation expenses, and prejudgment interest in sums to be determined hereafter; interest shall accrue on the amount of the judgment as allowed by law. Judgment is entered for the defendants on Counts II, IV, V, VII, VIII, IX, and XIII of the plaintiffs' complaint. Declaratory judgment is entered for the plaintiffs as to defendant Detrex's liability for all future response costs incurred by plaintiffs in responding to the TCE contamination at plaintiff Elkhart Products' Plant in Elkhart, Indiana. The future response costs for which defendant Detrex and its successors or assigns are liable include attorney fees, litigation expenses, and prejudgment interest.

and

(7) GRANTS the plaintiffs' motion to enforce the supersedeas bond (filed January 28, 1994 (#394)).

SO ORDERED.

ENTERED: March 28, 1994.

/s/ Robert L. Miller, Jr.
ROBERT L. MILLER, JR.
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case No. S88-620M

AMCAST INDUSTRIAL CORPORATION, *et al.*,
Plaintiffs

v.

DETREX CORPORATION, *et al.*,
Defendants

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that previously, on November 18, 1991, partial summary judgment was granted to plaintiffs and to defendants. In light of that decision, as well as the decision reported at 822 F. Supp. 545 (N.D.Ind.1992), and the decision and mandate of the United States Court of Appeals for the Seventh Circuit, *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746 (7TH Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994), judgment is entered herein accordingly. Judgment is entered for the plaintiff on Count I of the plaintiffs' complaint in the amount of $1,197,082.42 as response costs incurred as of November 22, 1991, plus attorney fees, litigation expenses, and prejudgment interest in sums to be determined hereafter; interest shall accrue on the amount of the judgment as allowed by law.

Judgment is entered for the defendants on Counts II, IV, V, VII, VIII, IX, and XIII of the plaintiffs' complaint. Declaratory judgment is entered for the plaintiffs as to defendant Detrex's liability for all future response costs incurred by plaintiffs in responding to the TCE contamination at plaintif [sic] Elkhart Products' Plant in Elkhart, Indiana. The future response costs for which defendant Detrex and its succesors or assigns are liable include attorney fees, litigation expenses, and prejudgment interest.

Current interest rate: 4.51%

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on: April 4, 1994

Geraldine J. Crockett

By /s/ [Illigible]
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S88-620M

AMCAST INDUSTRIAL CORPORATION, *et al.*,
Plaintiffs

vs.

DETREX CORPORATION, *et al.*,
Defendants

MEMORANDUM AND ORDER

This cause is before the court on the supplemental motion of plaintiffs Amcast Industrial Corporation and Elkhart Products Corporation (collectively "Amcast") for attorney fees, litigation expenses, additional response costs, and prejudgment interest. For the reasons that follow, the plaintiffs' motion is granted in part and denied in part.

Amcast seeks $57,122.85 in additional response costs incurred between May 1, 1992 and July 31, 1993. Charles Rytlewski, Elkhart Product Corporation's controller, affirms that Amcast expended $12,045.00 on system service charges (sewer and utilities); $5,833.85 on labor expenses; $38,284.00 on consultants (investigation, design, monitoring); and $960.00 on equipment, installation and monitoring costs. Detrex has not objected to these additional response costs, and the court finds these additional response costs reasonable. Accordingly, Amcast is entitled to recover $57,122.85 in additional response costs.

Amcast also seeks $163,345.70 in attorney fees. In light of the United States Supreme Court's recent decision

in *Key Tronic Corp. v. United States*, No. 93-376, 1994 WL 237635 (U.S. June 6, 1994), which held that private litigants' attorney fees associated with bringing a cost recovery action under § 107 of CERCLA are not recoverable, Amcast's motion for attorney fees must be denied.

Accordingly, the plaintiffs' supplemental motion for attorney fees, litigation expenses, additional response costs, and prejudgment interest (filed February 22, 1994 (#403)) is GRANTED IN PART and DENIED IN PART as follows:

(1) the motion is GRANTED with respect to the plaintiffs' request for additional response costs, Detrex Corporation is hereby ORDERED to pay the plaintiffs $57,122.85 in additional response costs, and the plaintiffs are ORDERED to calculate the prejudgment interest on the additional response costs and submit that figure to the court within fifteen (15) days of the date of this order; and

(2) the motion is DENIED with respect to the plaintiffs' supplemental request for attorney fees and litigation expenses.

SO ORDERED.

ENTERED: June 15, 1994.

/s/ Robert L. Miller, Jr.
ROBERT L. MILLER, JR.
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S88-620M

AMCAST INDUSTRIAL CORPORATION, *et al.*,
Plaintiffs

vs.

DETREX CORPORATION, *et al.*,
Defendants

ORDER

On April 15, plaintiffs Amcast Industrial Corporation and Elkhart Products Corporation (collectively "Amcast") submitted their recalculation of prejudgment interest based upon the court's March 30 Memorandum and Order. Amcast requests $35,830.37 in prejudgment interest on attorney fees and litigation expenses, and $2,121.85 in prejudgment interest on previously incurred response costs.

Based upon *Key Tronic Corp. v. United States*, No. 93-376, 1994 WL 237635 (U.S. June 6, 1994), Amcast is not entitled to prejudgment interest on the court's previous award of attorney fees. Defendant Detrex Corporation filed no objection to the amount of $2,121.85 in prejudgment interest on the additional response costs, and that amount will be awarded to the plaintiffs.

Accordingly, the court ORDERS defendant Detrex Corporation to pay the plaintiffs $2,121.85 in prejudgment interest.

SO ORDERED.

ENTERED: June 15, 1994.

/s/ Robert L. Miller, Jr.
ROBERT L. MILLER, JR.
Judge
United States District Court

Supreme Court, U.S.
FILED
MAY 19 1995
OFFICE OF THE CLERK

No. 94-1658

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Petitioners,

v.

DETREX CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the mandate of 42 U.S.C. § 9613(g)(2)—that a declaratory judgment on liability for environmental response costs is binding in all further actions to recover response costs—should be applied to an order quantifying attorneys' fees and costs that were awarded, consistent with the law at the time, as response costs under CERCLA in a declaratory judgment affirmed on appeal and from which *certiorari* was denied prior to this Court's decision in *Key Tronic Corp. v. United States,* —— U.S. ——, 114 S. Ct. 1960 (1994).

2. Whether a declaratory judgment deciding Petitioners' entitlement to recover attorneys' fees and litigation expenses as response costs, pursuant to 42 U.S.C. § 9613(g)(2) is binding under *res judicata* or collateral estoppel principles regardless of a subsequent change in law in *Key Tronic v. United States,* —— U.S. ——, 114 S. Ct. 1960 (1994), which determined that response costs under CERCLA do not include attorneys' fees and expenses incurred in litigation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
I. INTRODUCTION	1
II. PETITIONERS WERE AWARDED A FINAL JUDGMENT THAT RESPONDENT WAS LIABLE FOR ATTORNEYS' FEES	2
III. DENYING BINDING EFFECT TO THE DECLARATORY JUDGMENT THAT RESPONDENT DETREX WAS LIABLE FOR RESPONSE COSTS, WHICH INCLUDE ATTORNEYS' FEES, WOULD RENDER § 9613(g)(2) OF CERCLA MEANINGLESS	4
CONCLUSION	6

TABLE OF AUTHORITIES

CASES Page

Amcast Indus. Corp. v. Detrex Corp., 45 F.3d 155 (7th Cir. 1995) 2

United States v. Kramer, 757 F. Supp. 397 (D.N.J. 1991) 5

United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987) 5

STATUTES

42 U.S.C. §§ 9601-9675 2

42 U.S.C. § 9613(g)(2) 2, 4, 5

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

I. INTRODUCTION

The Petitioners' reply will refute two erroneous arguments made by Respondent Detrex Corporation ("Detrex") in Respondent's brief in opposition. First, Respondent Detrex erroneously argues that after this Court denied Respondent's petition for writ of *certiorari*, the trial and appellate courts' finding that Detrex was liable for response costs, which include attorneys' fees, was not final. Respondent's Brief in Opposition, pp. 9-10, 12. On the contrary, the issue of liability for attorneys' fees was final at the time the petition for a writ of *certiorari* was denied and all that remained open for further litigation was the quantification of recoverable attorneys' fees.

Second, Respondent erroneously argues that the decision of the Seventh Circuit, if allowed to stand, will very likely have little impact on future litigants. Respondent's Brief in Opposition, p. 8. On the contrary, the Seventh Circuit's decision, if not reversed by this Court, will have a substantial adverse effect on future environmental litigation by rendering § 9613(g)(2) of CERCLA [1] meaningless and wreaking havoc on Superfund litigation across the country.

II. PETITIONERS WERE AWARDED A FINAL JUDGMENT THAT RESPONDENT WAS LIABLE FOR ATTORNEYS' FEES

The Seventh Circuit, in its opinion, recognized that, in the first appeal, it had affirmed, with an immaterial exception, the declaratory judgment that awarded Amcast Industrial Corporation ("Amcast") and Elkhart Products Corporation ("EPC") attorneys' fees and expenses in an undetermined amount. *Amcast Indus. Corp. v. Detrex Corp.*, 45 F.3d 155 (7th Cir. 1995), App., p. 3(a). The Court of Appeals also correctly recognized that, in the first appeal, it decided upon full hearing and with finality that response costs included attorneys' fees. *Id.*, App. p. 7(a). As the Seventh Circuit stated, "[w]e had decided the issue of entitlement 'finally.'" *Id.*

This being true, the only issue left for litigation was the quantification of recoverable attorneys' fees, *i.e.*, whether the fees claimed were reasonable. The issue of Detrex's liability for payment of attorneys' fees was finally determined—the only issue that remained was the amount of those fees.

Respondent admits that litigation under CERCLA usually proceeds in "two distinct phases, *i.e.*, liability and damages" and that Congress intended that the declaration of liability have application in subsequent actions

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[1] Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675.

without regard to the actual amount or categories of response costs. Respondent's Brief in Opposition, p. 12. Moreover, Respondent Detrex admits that the Seventh Circuit's "first opinion confirmed Detrex's liability under one section of" CERCLA. Respondent's Brief in Opposition, p. 2. A finding of liability for response costs would necessarily include a determination as to the kinds or categories of response costs remaning to be quantified. Having recognized the distinction between liability for response costs and damages or amount of those costs, it is disingenuous for Detrex to assert that the kinds or categories of recoverable costs are not finally determined in the liability stage of a CERCLA case.

The Seventh Circuit's disposition of the attorneys' fees issue is inconsistent with its disposition of another issue raised by Detrex on appeal, *i.e.*, alleged noncompliance with the National Contingency Plan ("NCP"). In the court below, Petitioners moved to dismiss that portion of Respondent Detrex's appeal which sought to (1) excuse Detrex from any liability for response costs, on the ground that appellees had failed to comply with the NCP, and (2) excuse Detrex from having to pay attorneys' fees. The Seventh Circuit dismissed Detrex's appeal on the issue involving noncompliance with the NCP reasoning:

> "It is true that our opinion does not mention the NCP issue, but in upholding Detrex's liablity for response costs *we necessarily rejected every ground on which Detrex had opposed that liability*. If Detrex thought we had somehow overlooked that ground, it should have filed a petition for rehearing. It did not." (Emphasis added.)

Order, App., p. 38(a). Likewise in the first Detrex appeal, the Seventh Circuit, in affirming the declaratory judgment that Detrex was liable for response costs, which included attorneys' fees, necessarily rejected every ground on which Detrex had opposed liability for fees, including its argument that attorneys' fees are not recoverable un-

der CERCLA.[2] Thus, the only issue regarding attorneys' fees open for determination was the amount or quantification of those fees, *not* liability for those fees. The determination that Respondent was liable for attorneys' fees became final when this Court denied Detrex's petition for a writ of *certiorari*.

III. DENYING BINDING EFFECT TO THE DECLARATORY JUDGMENT THAT RESPONDENT DETREX WAS LIABLE FOR RESPONSE COSTS, WHICH INCLUDE ATTORNEYS' FEES, WOULD RENDER § 9613(g)(2) OF CERCLA MEANINGLESS

This Court must grant the petition for a writ of *certiorari* to review the Seventh Circuit's decision because that decision, if it stands, will cause a substantial adverse effect upon future environmental litigation.

Section 9613(g)(2), 42 U.S.C., provides that "the court shall enter a declaratory judgment on liability for response costs or damages *that will be binding on any subsequent action or actions to recover further response costs or damages*." (Emphasis added.) This unambiguous language means that a finding in an initial enforcement action that various responsible parties are liable for categories of response costs cannot be relitigated in a subsequent action or proceeding.

This is important because it is a common practice in CERCLA litigation for the Government to initiate an enforcement action against numerous potentially responsible parties ("PRPs"). It is well settled that once the

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[2] In deciding the motion to dismiss in Detrex's second appeal, the Seventh Circuit declined to dismiss Detrex's appeal as to its liability for attorneys' fees because the law of the case doctrine, according to the Seventh Circuit, does not bar reconsideration. Order, App., p. 38(a). In this petition, Petitioners do not rely on the doctrine of law of the case, but assert that the unambiguous language of § 9613(g)(2) of CERCLA makes the declaration that Respondent was liable for response costs, which include attorneys' fees, final and binding and not subject to relitigation.

liability of PRPs has been established for categories of response costs that liability cannot be relitigated in a subsequent contribution action in which the Court is asked to allocate damages among Defendant PRPs. *United States v. Kramer*, 757 F. Supp. 397, 413 (D.N.J. 1991) ("But the court's discretion in allocating damages among the defendants during the contribution phase does not affect the defendants' liability."); *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) ("[T]he Court will consider contribution of damages at a subsequent proceeding since it does not affect defendants' initial liability.").

One logical consequence of Respondent's interpretation of § 9613(g)(2) is that once a finding of liability for categories of response costs is established, the issue of liability for categories of response costs could be relitigated in subsequent contribution actions. Such a result is at odds with the Seventh Circuit's opinion in this case regarding liability for non-attorney fee response costs and well-settled principles of *res judicata*. Moreover, such a result could lead to a serious breakdown of the federal judicial system. The only sensible and fair meaning of the statutory language that "a declaratory judgment on liability for response costs or damages [that] will be binding on any subsequent action or actions," 42 U.S.C. § 9613(g)(2), is that liability for categories of response costs such as attorneys' fees, once decided and affirmed on appeal, cannot be relitigated in a subsequent action or proceeding to quantify those costs. Thus, the Seventh Circuit erred in failing to give the declaratory judgment that Respondent was liable for response costs, which include attorneys' fees, binding effect. The Seventh Circuit's decision could substantially complicate environmental litigation pending in the federal courts by permitting disruptive and inefficient relitigation of findings of liability for categories of response costs, which the unambiguous language of § 9613(g)(2) of CERCLA was intended to avoid.

CONCLUSION

In conclusion, this petition for a writ of *certiorari* presents an important and significant question under CERCLA law which this Court should address. Accordingly, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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